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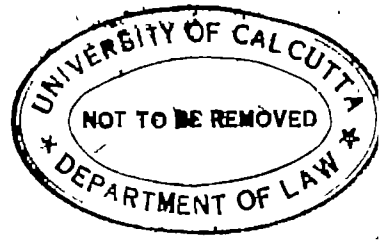



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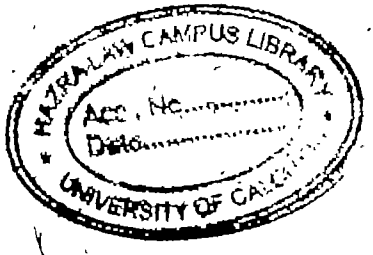
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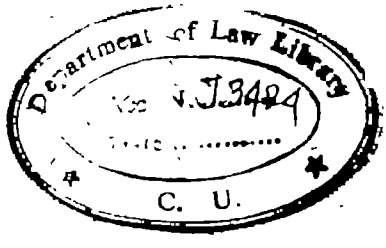

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1951.

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Chief Justice.

The Hon'ble Sir Arthur Trevor Harries.

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# TABLE OF CASES REPORTED.

## VOL. 88.

---

## SUPREME COURT.


Haris v. The State of Rajasthan ... ... ... 265
Rajlakshmi Biswas v. Nursingdas Binnany .. ... 52
Ram Gopal v. Nand Lal ... ... ... 1
Sri Shankari Prasad Singh Deo v. The Union of India ... 281


## APPELLATE CIVIL.


Dominion of India v. Virjee Doya & Co. ... ... 59
Jatindra Nath Shee v. Malal Ram Shaw ... ... 119
Muralidhar Agarwalla v. Rupendra Nath Mitter ... 126
Sarvamangala Dassi v. Paritosh Kumar Das and others ... 183


## APPEAL FROM ORIGINAL CIVIL.


Bela Debi v. Bon Behari Roy .. ... .. 40
Bejoy Singh Karnwat v. Bilasroy & Co. .. .. 202
D. M. Jackson v. Cliffords Hockley .. .. 90
Dharani Mohan Roy v. Ram Avatar Shaw ... .. 108
Goneshmull Surana v. Nagraj Surana ... ... 271
Gopi Mohan Bhattacharjee v. Sambhu Charan Nundy ... 196
Hembala Dassi v. Sundar Shaw .. ... ... 70
Khusiram Banarshilal v. Kian Gwan Co. (Cal.) Ltd. .. 165
Nalini Ranjan Guha v. Annada Sankar Ray ... ... 137
Pyari Churn Law v. Monmotha Nath Banerjee ... 27
Pannalal Sagoremull v. Fatch Chand Murlidhar .. 34
S. B. Trading Corporation Ltd. v. Olympia Trading Corporation Ltd. ... ... ... ... 195
S. B. Trading Co. Ltd v. Shyamlal Ramchandra ... 233

## APPEAL FROM ORIGINAL CIVIL.

Kanahyalal Ruia v. Corporation of Calcutta ... ... 78

## CIVIL REVISION.

Bata Shoe Co. Ltd. v. Narayan Das Mullick and others ... 191

Debendra Nath Sarkar v. Parul Bala Ghose ... ... 105

Krishna Khandelwal and others v. Director of Land Hiring etc. and others ... ... ... ... 172

Lankeswar Haldar and another v. Ram Gopal Naskar and others ... ... ... ... 180

Naresh Chandra Guha v. Ram Chandra Samonta and others 149

Tamluk Loan Co. Ltd. v. Kedar Nath Das ... ... 102

Tulsi Charan Das v. Subal Chandra Das ... ... 65

## CIVIL REFERENCE.

Routhmull Babu v. Kamalaksha Chowdhury ... ... 133

## APPELLATE CRIMINAL.

M. C. Mitra v. The State ... ... ... 14

# TABLE OF CASES CITED.

## VOL. 88.

### A


| | PAGE. |
|---|---|
| Abinash Chandra Dutt *v* Gour Chandra Pal, (1951) 55 C.W.N. 489 | 183, 189 |
| A. C. Mahomed *v.* Corporation of Calcutta, (1940) 45 C.W.N. 408 | 89 |
| Adams *v.* Naylor, [1946] App. Case 543 ... ... .. | 137, 146 |
| Ainsworth *v.* Wilding, [1896] 1 Ch. D. 673 ... ... ... | 196, 201 |
| Amar Chandra Kundu *v* Sebak Chand Chowdhury, (1907) I.L R. 34 Calc. 642 F.B. .. .. ... ... .. | 277 |
| Amarnath Misra *v.* Sreenarayan Mansinghka, (1950) 54 C.W.N. 617; 87 C.L.J. 4 ... ... .. ... .. | 234, 261 |
| Asmat Ali Sharip *v.* Mejahar Ali Sardar, (1947) 52 C.W N. 64 (S.B ) ... | 183, 189 |
| Atul Chandra Kundu *v.* Sarat Chandra Laha, (1920) 24 C.W.N. 967 .. | 154 |


### B


| | |
|---|---|
| Babulal *v.* King Emperor, [1945] I.L.R. Nag. 762 ... ... | 270 |
| Badri Pande *v.* Chhangur, [1935] A.I.R All. 102 .. . | 48 |
| Bai Moolibai *v.* Chunilal Pitambar, (1909) I.L.R. 33 Bom. 630 .. | 75 |
| Baijnath Bajoria *v.* Sk. Md Mateen, (1950) 55 C.W.N. 277 .. ... | 116 |
| Baijnath Chauby *v.* Varajlal Moolji, (1944) 48 C.W.N. 481 ... | 99, 100 |
| Bajranglal Laduram *v.* Ganesh Commercial Co., Ltd.—Unreported judgment of Sinha J dated 20-4-48 . . ... | 221 |
| Bajranglal Laduram *v.* Ganesh Commercial Co. (1949) 55 C.W.N. 147 ... | 226, 227 |
| Bajrang Lal Laduram *v.* Agarwal Bros., [1950] A.I R. Cal 267 .. | 87 |
| Balwanta *v.* Bira, (1897) I.L R. 23 Bom. 56 .. ... ... | 155 |
| Ballabhdas *v.* Paikaji, (1916), 38 I.C. 915 . ... 155, 158, | 161, 162 |
| Ballabhram Badrinarayan *v.* Devi Prosad Soni Khettry, unreported judgment of P. B. Mukharji, J. in Original Civil Suit No. 3397 of 1948 ... ... ... ... ... ... | 116 |
| Ballabhram Badrinarayan *v* Debi Prosad Soni Khettry,—Unreported Appeal from Original Civil No. 18 of 1950 ... ... .. | 117 |
| Banku Behari Dhur *v.* J. G. Galstaun, (1922) 27 C.W.N. 77 . . | 158 |
| Bansi Dhar Kunji Lal *v.* Lalita Prosad and another [1934] A I.R. All. 543 | 99 |
| Bhai Panna Singh *v* Firm Bhai Abjan Singh, (1939) 33 C.W.N 949 . . | 158, 162 |
| Billings *v.* Reed, [1944] 2 All. E.R. 415 .. . | 137, 146 |
| Bishan Chand *v.* Radha Kishan Das, (1897) I.L.R. 19 All. 489 ... | 153, 154 |
| Bishnunath Prasad *v* Chandika, (1932) L.R. 60 I A. 56 . . . | 8, 15 |
| Bombay Co. Ltd. *v.* National Jute Mills Co. Ltd. (1912) I.L.R. 39 Calc. 669 | 224 |
| Brim Singh *v.* Sher Singh, (1947) 52 C.W.N 109 .. .. | 278 |
| Bunbury *v.* Fuller, (1853) 9 Ex. Rep. 111 (140): 156 E.R 47 (60) ... | 234, 254 |

## C

PAGE.

Chang Chung Ching *v.* King Emperor, (1944) 49 C.W.N. 229 ... 23
Channel Coaling Co. *v.* Ross, [1907] 1 K.B. 145 (148, 149), Halsbury, Vol 9, Paragraph 1481, Pp. 878-879 referred to ... ... 138, 144
Champsay Bhara & Co. *v.* Jivraj Balloo Spinning & Weaving Co. Ltd., (1923) L.R 50 I.A. 324 ... ... ... ... 231
Chettiar *v* Chettiar [1948] A.I.R. Mad. 15 ... ... 49, 50
Chhogmal Rawatmal *v.* Sankal Chand G. Shah, (1949) 53 C.W.N. 828 ... 221, 227
Chiranji Singh *v.* Har Swarup, [1926] A I.R. P.C. 1 ... 154, 156, 163
Chiranjit Lal *v.* Union of India, [1951] A.I.R. (S C.) 41 ... ... 234, 238
Chunilal *v.* Bai Mani, (1918), I.L R. 42 Bom. 504 ... ... 278
Chunna Mal *v.* Mool Chand (1928) I.L.R. 9 Lah. 510 ... ... 159
Chunnilal *v.* Nizam's Guaranteed State Railway Co. Ltd., (1906) I L.R. 29 All. 228 (F B.) ... ... ... ... ... 58, 62
Collins *v.* Stimson, (1883) 11 Q B D. 142 ... ... ... 154
Cooper *v.* The London Brighton and South Railway Co., (1879) 4 Ex. D. 88 (92-93) ... ... ... ... ... 155
Cornwall *v.* Henson, [1900] 2 Ch. 208, and Halsbury's Laws of England, 2nd Edd. Vol 29, pp 376-7, Art. 514 ... ... ... 155
Crown *v.* Manghumal Tekumal, [1944], I.L R. Karachi 107 ... 270
Creet *v.* Miller, (1947) 2 All. E.R. 45 ... ... ... 125
Currimbhoy and Company Limited *v.* Creet, (1932) L.R. 60 I A. 297 (303) 95

## D

Debendra Nath Dutt *v.* Satyabala Dassi, (1950) 54 C.W.N 110 ... 299, 301
Depree *v.* Bedborough, (1863) 4 Giff. 479 ... ... ... 154
Besu Rattamma *v.* Kakaraparthi, (1927) 54 M L.J 40 ... ... 155
Dinanath Damodar Kale *v.* Malvi Mody Ranchhoddas & Co , (1929) 32 Bom. L R. 272 ... ... ... ... ... 158, 162
Doe d. Cial *v.* Timothy, (1847) 175 E.R. 145 ... ... ... 124
Doe d Bake *v.* Woombrith, (1811) 170 E.R. 1251 ... ... 124
Doe *v.* Spiller, (1807) 6 Exp. 70 ... ... ... ... 123
Doe d. Cox *v.* Roe, [1802] 4 Exp. 185 ... ... ... ... 123
Doe d. Williams *v.* Smith, (1836) 5 Ad. and El. 350 ... 123, 125
Doe d. Digby *v.* Steel, (1811) 170 E.B. 1324 ... ... 124, 125
Durga Prosad Chamaria *v.* Amardeyi Sethani, (1948) 50 C.W.N 880 ... 231

## E

Edward Dalgleish *v.* Ramdin Singh, (1909) 14 C.W.N. 170 ... ... 96
Exparte Stephens (1805) 11 Ves 24 ... ... ... 94

## F

Falkingham *v* Victorian Railway Commissioner, [1900] A.C. 452 (463-4) 38
Furquharson *v.* Morgan, [1894] 1 Q.B. 552 (557, 559 to 560) ... 137, 142

PAGE.

Firm Ramnath Ladhuram *v.* North Western Railway, [1926] A.I.R. Lah. 631 .. .. .. .. .. 59, 63

G

Gajanan *v.* Moreshwar, [1942] A.I.R. Bom. 302 .. .. .. 158
Ganga Prasad *v.* Prem Kumar Kapti, [1949] A I R All. 173 .. .. 125
Ganesh *v.* Narayan, (1931) I.L.R. 55 Bom. 709 .. .. . 278
Giri Narain Chatterji *v.* Modhu Sudan Mukerji, (1911) 17 C.W.N. 324. 126, 129, 130
Girldhari *v.* Purnendu, (1958) 68 C.L J. 484 .. .. . 123
Gnanaprakasan *v.* Vex, (1931) 60 M.L.J. 293 . .. . 128
Government of Bengal *v.* Alimaddin, (1932) 57 C.L.J. 41 . 27, 30, 31, 32

H

Haji Sattar Haji Pir Mahammad *v* Khusiram Banarashilal; unreported judgment of Harries, C J. & Das Gupta, J. in A.O Order No. 123 of 1948 dated 25th August, 1949 .. . .. .. 211
Hall *v.* Burnell, [1911] 2 Ch. 551 .. . . .. 153, 154, 160
Hattan *v.* Harris, [1892] A.C. 547 .. .. .. .. 50
Haran Chandra Dey *v.* Sm. Charu Bala Dassi, (1948) 53 C.W.N. 553 .. 111
Harendra Nath Chaudhury *v* Sourendra Nath Chaudhuri, (1942) 48 C.W.N. 882 .. .. .. .. .. 100
Hare Krishna Rana *v.* Jamini Sundari Dassi, [1950], A I.R. Cal. 555 .. 65, 68
Harihar Banerji *v.* Ramsashi Roy, (1918) L.R. 45 I.A 222 .. . 123, 124
Harvey *v.* Harvey, (1884) 26 Ch. D. 644 .. . .. 75
Hem Chandra Dutta *v.* Haren Chandra Mete, (1949) 54 C.W.N. 164 .. 27, 31
Hirendra Nath Datta *v.* Corporation of Calcutta, [1941] I.L.R. 1 Calc. 435 89
Hirji Ramji *v.* Daulatram Ratanji, [1940] I.L R Bom. 10 .. . 93
Hrishikesh Mukherjee *v.* Jagadish Chandra Roy Chowdhury, (1945) 49 C.W.N. 385 .. . .. .. 133, 135
Homi Rustomji Pardivala *v.* Sub Inspector Baig and others, [1944] A.I.R Lah 196 . .. .. 77

I

Ibrahim *v.* Fletcher, (1897) I.L.R 21 Bom. 827 .. .. 150
In re: Arbitration; Sree Kissen Beriwalla Ltd. and Messrs. Naraindas Ganeshlal—Unreported judgment of Das, J. dated 15th April, 1948 in Award Case No. 39 of 1948 . .. 207, 218, 220, 229
In re: Arbitration; Dharmachand Tamakuwalla *v* Khusiram Benarshilal —unreported judgment of Clough, J., dated 3rd May, 1948 in Award Case No. 26 of 1948 .. .. .. .. 209
In re: Arbitration; Sri Kissen Beriwalla Ltd. *v* Hari Krishna Sadani— unreported judgment of Sinha, J. dated 24th September, 1948 in Arbitration Case No. 82 of 1948 .. 215, 219, 220, 227, 229
In re: Baijnath Chauby & Co. *v* Varajlal Mooljı, (1944) 48 C.W.N. 481 (482) .. .. .. .. .. .. 93

PAGE.

In re: Bhicanchand Ghororia *v* G & M Fogl, (1926) 44 C L.J 222 . 225
In re: Chaitram Rambilas *v* Bridhichand, (1915) I L.R 42 Calc. 1140 224, 227
In re: Chandrabhan *v.* Ganpatrai & Sons, [1948] I L.R. 1 Calc. 156 225, 227
In re: Dagenham (Thames) Dock Co., Eparte Hulse (1873) 8 Ch. App. 1022 ... .. .. ... ... ... 154
In re: Hurdway Mull *v.* Ahmed Musaji Selaji, (1908) 13 C.W.N. 65 . 223
In re: Ishan Chandra Ray (1881) I.L.R 6 Calc. 707 . . 188, 189
In re: Lakshmi Moni Dasi [1941] I L.R. 1 Calc 16 .. ... 89
In re: Parnell (1875) L.R. 10 Ch. App. 512 . ... .. 153, 154
In re: Radha Kissen Khetry *v* Luchmi Chand Jhawar, [1920] A.I R. Calc. 150 ... . . ... 224, 228
In re: St. Nazaire Co. [1879] 12 Ch D. 88 .... ... .. 48
In re: Stoke *v* Taylor, (1880) L.R. 5 Q.B D. 569 . ... 94
In the matter of Lloyds Bank Ltd. *v.* The Lloyds Bank Indian Staff Association (Calcutta Branches), unreported judgment of the Calcutta High Court dated 17-1-51 ... . .. 178

J

Jackson *v.* Beaumont (1855) 11 Ex. 300: 156 E.R. 844 (845, 846) ... 138, 143
Jagarnath Prasad Bhagat *v.* Jamuna Prasad Singh, [1934] A.I.R. Pat 493 47
Jai Narain *v.* Narain Das (1922) I.L.R. 3 Lah. 296 ... ... 37
James Clark (Brush Materials) Ltd. *v.* Carters (Merchants) Ltd., [1944] L.R. K.B. 566 ... ... ... ... 251
Jamnadass Nagindass *v.* Behariilal Bisheswarlal, [1941] A.I.R. Nag 258 ... 99
Jamini Bala Biswas *v.* Bank of Chettino Ltd.. [1935] A I R. Rang 522 (523) .. ... ... .. 48
Jamal *v.* Moolla Dewood, (1915) L.R. 43 I.A. 6 .. .. 226
Jayantilal Hiralal & Co. *v.* Waman Narayan Velinkar, [1932] A I.R. Bom. 638 .. ... ... ... ... ... 75
Jewan Ram *v.* Ratan Chand Kissen Chand, (1921) 26 C W.N 285 126, 128, 129
Johnson *v.* Sargant, [1918] 1 K.B. 101: 67 L.J. K.B. 122 .. .. 269
Joy Kumar Sarkar *v.* S K. Chaudhuri, (1951) 55 C.W N. 471 .. 121
Julius Block *v.* Louis Hirsh, (1921) 256 U.S. 135: 65 Lawyer's Edition 865 .. ... ... ... ... 234, 250
Jwaladutt R, Pillani *v.* Bansilal Motilal, (1929) I.L.R. 53 Bom 414 (P.C.) 158

K

Karim Mahomed *v.* Rajooma (1888) I.L.R. 12 Bom. 174 (185) ... 50
Karsondas *v* Chhotalal (1923) I.L.R. 48 Bom 259 .. .. 160
Keshavlal *v* Protapsing, (1931) I.L.R 56 Bom 101 .. .. 158, 159
Khusiram Benarashilal *v.* Mathuradas Goverdhandass, (1948) 52 C.W N. 826 . .. .. ... .. 211, 229
Khisori *v.* Chhanga, (1924) I.L.R. 47 All. 44 . .. . 50
Khusiram Banarashilal *v.* Girdharilal Dhanamchand—Unreported judgment of C J. & Sinha, J. in Appeal from Original Order No. 80 of 1948, dated 25th August, 1949 .. ... . 209, 226

PAGE.

Kollany Kooer *v.* Luchmee Pershad, (1875) 24 W R. 395 ... .. 1, 6
Krisna Chandra Rudra Pal *v.* Khan Mamud Bepari, (1935) 40 C.W.N. 659 ... .. ... ... ... .. 154, 155
Krishnaswami Iyer *v.* Seethalakshmi Ammal, [1919] A I.R. Mad. 479 .. 276
Khushiram Benarashilal *v.* Sagarmal Bhanraj—unreported judgment in Award Case No. 139 of 1948 ... ... ... ... 227

L

L. Ram Chandra Sarup *v.* Mazhar Hussain, [1919] A.I R All. 264 48
Ledgard *v.* Bull, (1886) L.R. 13 I A. 134 (140, 141-145) .. . 137, 142
Lep Singh Khasia *v.* Nimar Khasia, (1893) I L.R. 21 Calc 244 126, 129, 130, 131
Lingangowda *v.* Basangowda, (1927) L.R. 54 I.A. 122 .. .. 275
Levy *v.* Stogdon, [1899] 1 Ch 5 .. . ... 154, 159
Local Government Board *v* Arlidge, [1915] A.C. 120 .. . 282, 292
Louis Dreyfus & Co. *v.* Purusottum Das Narain Das, (1914) I L.R. 47 Calc. 29 ... . . ... . ... 224

M

Mangovinda Dutta *v.* J Balsogniaff, [1922] A I R Calc. 104 . 153. 154
Manian Patter *v.* The Madras Railway Company, (1905) I.L.R. 2 9 Mad. 118 . .. .. .. .. ... 155
Mathuradas Govardhandas *v.* Khushram Benarashilal, (1949) 53 C W.N. 873 ... .. ... .... ... ... 212
Maharaja Bir Bikram Kishore Manikya Bahadur *v.* Raj Kumar Pal, (1934) 58 C.W.N. 1951 .. ... ... 27, 31
Mahomed Shumsool *v.* Shewukram, (1874) L.R. 2 I A. 7 .. .. 13
Manmatha Nath Mullick *v* Hedait Ali, (1931) L R. 59 I.A 41 126, 128, 129
Manik Lal *v.* S. Dobiruddin, (1950) 54 C.W.N. 572 ... ... 238
Maung Chit Hlaing *v.* N A. M. Chetty, [1924] A.I.R. Rang 104 .. 46
Mayson *v.* Clouet, [1924] A.C 980 .. .. ... 154, 155
Mellor *v.* Swire, (1885) 30 Ch D. 239 .. ... .. 48
Middleton *v.* Pollock, (1875) 20 Eq. 29 (34) .. ... . 94
Mohori Bibee *v.* Dharmodas, (1903) I.L.R. 30 Calc. 539 (P.C) ... 158, 159
Monmatha Nath Dutt *v.* Matilal Mitra, (1928) 33 C.W.N. 614 126, 128, 129
Monomohan Moitra *v.* Gobinda Das Chowdhury, (1950) 55 C.W.N. 6 121
Muhammad Habibullah *v.* Muhammad Shafi (1919) I.L.R. 41 All. 324 154
Mullins *v.* Howell, 11 Ch. D. 763 . .. ... ... 196, 200
Mukhram Lachmi Narain *v.* Khushiram Benarashilal—unreported judgment of C J. & Chatterjee, J. in A.O. Order No. 2 of 1949 dated 29th March, 1949 .. .. .. .. 213, 227, 229
Murlidhar *v.* International Film Co. Ltd., [1945] A.I.R. P C. 34 (38-39) 149
Murari Mohan Mukherjee *v.* Prokash Chandra Chatterjee, (1949) 53 C W.N 640 .. ... ... ... ... 146

## N

PAGE.

Nadiar Chand Guin *v* Satis Chandra Sukul, (1927) I.L.R. 55 Calc. 698 154
Natesa *v* Appava, (1913) I L.R. 38 Mad. 178 F.B. 153, 154, 158, 160, 161
Nawab Khaja Habibullah *v.* Arman Dewan, (1919) 24 C.W.N. 40 155, 157
Nobin Chandra *v.* Sinclair Murray & Co., [1914] A I.R. Calc. 818 224

## P

P. K. Banerjee *v.* L J. Simonds, [1917] A.I R. Calc 307 178
P. R. & Co, *v.* Bhagwandas, (1909) I.L.R 34 Bom. 198 158
Palmer *v.* Temple, (1839) 9 Ad. & E I 508 154
Pannalal Sagormul *v.* Mukhram Radhakissen, (1922) 39 C L J. 77 226
Peat *v.* Jones & Co., (1881) 8 Q.B.D. 147 94
Preston Banking Co. *v.* Allsup, [1895] 1 Ch. 141 48
Promod *v.* Rey, (1949) 53 Cr. L. J. 197 84
Prosad Das Sen *v.* Corporation of Calcutta and another—unreported judgment of Gentle J. dated 11-6-48 in an application under section 45 of the Specific Relief Act 89

## Q

Queen *v.* The Commissioners for Special Purposes of the Income Tax, (1888) 22 Q.B.D. 313 (319) 148

## R

Radha Charn Ghuttack *v.* Zumuroonissa Khatoon, (1868) 11 W.R. 83 126, 131, 132
Radha Gobinda Shaha *v* Brijendra Coomar Roy Choudhury, (1872) 18 W.R. 527 27, 29, 31
R S. Hari *v.* A W. Grosso1, (1905) 9 C.W.N. 748 99
Rajendra Kishore Pal Chaudhury *v* Asir Ulla, (1937) 65 C L J 416 65, 68
Rajendra Prosad *v.* Ganga Bux Singh, [1945] A.I.R. Oudh 60 279
Rajendra Prasad *v.* Gopal Prasad, (1930) L R. 57 I A 296 56
Ram Chandra Sahu *v.* Jamna Prasad, [1935] A.I.R Oudh, 92 48
Rajah Rameshar Baksh *v.* Arjun, (1900) L.R. 28 I.A. 1 8, 13
Ram Sankar Bandopadaya *v.* Khudiram Dutt, [1942] A I.R. Pat. 328 48
Ramanandi *v.* Kalawati, (1927) I.L R. 7 Pal. 221 159
Ramdas Dwarkadas *v.* Orient Pictures, [1942] I L R. Bom. 759 165
Raghunath & Son *v.* A. R. Md. Umer & Co.—Unreported judgment of C.J. & Chatterjee, J., dated 24th March, 1949 in Appeal from Original Order No. 127 of 1948 221, 227, 229
Raghunath & Son *v.* Mahammed Umer & Co.—Unreported pudgment of Sinha, J., dated 30th April, 1948 in Award Case No. 241 of 1947 208, 210, 212, 215
Re Arbitration: Mukhram Lachmi Narain *v.* Khushiam Benarashilal—unreported judgment of Sinha, J. dated 3rd September, 1948 in Award Case No. 133 of 1948 213

PAGE.

Rai Harendra Nath Chaudhuri *v.* Rai Sourindra Nath Chaudhuri, [1942] I.L.R. 2 Calc. 485; 46 C.W.N. 882 ... ... 93, 94, 95
Re: Arbitration Rajputana Trading Co. *v.* Haji Ibrahim Kasim Cochinwalla—unreported judgment of C.J. & Chatterjee, J. dated 28-3-49 in A.O.O. 102 of 1948 ... ... ... 217
Re: Arbitration Tolaram Nathmul *v.* Ganesh Commercial Co.—Unreported judgment (Das, J.) Award Case No. 92 of 1947 ... 231
Re: Hiralal Banerjee (1937) 41 C.W.N. 603 (604) ... 93
Rex *v.* Carr Briant, (1943) 1 K.B. 607 ... ... ... 24
Rex *v.* City of London, etc., Rent Tribunal [1951] 1 All. E.R. 196 ... 38
Rex *v.* City of London &c. Rent Tribunal [1951] 1 Times Law Rep. 41 [1951] W.N. 34 ... ... ... ... 253
R. *v.* City of London etc. Rent Tribunal; Exparte Honig [1951] 1 All E.R. 195 ... ... ... ... ... 148
Rex *v.* Lincolnshire Justices, [1926] 2 K.B. 192 (201) ... ... 254
Rex *v.* London Tribunal, [1951] W.N. 34 ... ... ... 234
Rex *v.* Lincolnshire Justices, [1926] 2 K.B. 192 (201) ... ... 234
Rex *v.* Northumberland Compensation Appeal Tribunal: Exparte Shaw [1951] 1 K.B. 711 ... ... ... ... 148
Roshan Lal *v.* The Delhi Cloth & General Mills Co. Ltd., (1910) I.L.R. 35 All. 166 ... ... ... ... 153, 154, 160

## S

S. B. Trading Co. Ltd. *v.* Satyendra Chandra Sen, (1950) 86 C.L.J. 46 ... 238
S. C. Nordlinger *v.* Chandmull Mulchand, (1924) 28 C.W.N. 888 ... 232
S. K. Choudhuri *v.* Jai Kumar Sarkar, (1950) 55 C.W.N. 75 ... 234, 261
Saleh Mahomed Umer Dossal *v.* Nathoomal Kessamal, (1917) L.R. 54 I.A. 427 ... ... ... ... ... ... 231
Saminulla *v.* Nil Mamud, (1926) 97 I.C. 564 ... ... ... 126, 132
Sankar Ram *v.* Tulsi Bhagat, [1921] A.I.R. Pat. 307 ... ... 125
Sasiman Chowdhurani *v.* Shib Narayan, (1921) L.R. 49 I.A. 25 (35) ... 1, 7
Satyanarayan Banerjee *v.* Radha Nath Das, (1941) 45 C.W.N. 1085 ... 185
Satyendra *v.* S. B. Trading Co. Ltd., (1951) 55 C.W.N. 309 ... ... 241
Seaford Court Estate *v.* Asher, [1949] 2 All. E.R. 155 ... ... 159
Secretary of State *v.* Harbans Prasad, (1929) I.L.R. 52 All. 81 ... 59, 62
Shaikh Mohammad *v.* Baijnath, (1949) 54 C.W.N. 287 ... ... 116
Shakoor *v.* King Emperor, [1944] I.L.R. Nag. 150 ... ... 270
Sham Charn *v.* Wooma Charn, (1908) I.L.R. 25 Calc. 36 ... ... 123
Sheik Dawood Rowther *v.* South Indian Railway Co. Ltd., [1945] I.L.R. Mad. 174 ... ... ... ... ... 58, 63
Shiam Lal *v.* Mt. Moons Kuar, [1934] A.I.R. Oudh. 352 (354) ... 48
Shujnatmand Khan *v.* Gobind Behari, [1934] A.I.R. All. 100 ... 47, 50
Sidebotham *v.* Holland, [1895] 1 Q.B. 378 ... ... ... 123, 124
Singer Manufacturing Co. *v.* Raja Prosad, (1909) I.L.R. 36 Calc. 960 ... 155
Solomon *v.* Martin, (1934) 38 C.W.N. 461 (467) ... ... 158, 159
Spragru *v.* Booth, [1909] A.C. 576 ... ... ... ... 154
Soper *v.* Arnold, (1889) 14 A.C. 429 ... ... ... ... 154, 156
Sreenarain Mansingka *v.* Amarnath Mishra, (1950) 87 C.L.J. 4 ... 121, 122, 262
Stiffleo *v.* Martin, (1934) 39 C.W.N. 174 ... ... ... ... 155

PAGE.

Suraj Jan Bibee *v.* Banku Behary Saha, (1949) 54 C.W.N. 281 . 116
Sunamoyee *v.* Denonath Gir Sunnyasee, (1888) I.L.R. 9 Calc. 908 . 126, 132

T

T. V. Ranga Rao *v.* Seth Bulaksonlal, [1941] A.I.R. Mad 940 46
Tagore *v.* Tagore, (1872) L.R. I.A. Supp. 47 (65) . . 1, 6
Taylor *v.* Roe, [1893] 1 W.N. 14 . . . . 74
The King *v.* Post Master General, Exparte Carmichael [1928] 1 K.B. 291 (299, 301) . . . 138, 143
The King *v.* Blythe, (1949) 53 C.W.N. 887 . . . 23
The Queen *v.* The Justices of Surrey, (1870) L.R. 5 O.B. 466 ... 138, 143
The Vellore Taluk Board *v.* Gopalasami Naidu, (1914) I.L.R. 38 Mad. 801 163
Tika Ram *v.* Deoji Maharaj, [1934] All. L.J. 674 ... . 124
T. M. R. Chettiar *v.* G. R. Chettiar, [1948] A.I.R. Mad. 18 . 46
Tolaram Nathmal *v.* Bilasrai & Co.—unreported judgment of Sinha, J. dated 16-9-49 in Award Case No. 28 of 1949 .. ... 220
Tolaram Nathmal *v.* Bilasroy—unreported judgment in A.O.O. No. 180 of 1949 . . ... . ... 226, 227, 228
Tolaram Nathmal *v.* Ganesh Commercial Co. Ltd.—unreported judgment of Das, J. in Award Case No. 92 of 1947 .. .. 223, 230
Tolaram Nathmal *v.* Ganesh Commercial Co. Ltd.—unreported judgment in A.O.O. 6 of 1948 . . .. 221, 223, 228
Turnock *v.* Sartoris, L.R. 43 Ch. D. 150 . ... ... 165

V

Varadaraja *v.* Muniappa, (1929) 57 M.L.J. 785 ... ... 155
Venkatanarayana Pillai *v.* Subbammal, (1915) L.R. 42 I.A. 125 . . 277

W

Wade-Gray *v.* Morrison, 37 L.T. (N.S.) 270 . . ... 165
W. Davis Ltd. *v.* Huntley, [1947] 1 All. E.R. 246 . . .. 123
Woodoyaditto Dey *v.* Mukoond, (1874) 22 W.R. 225 ... .. 9
Wride *v.* Dyer [1900] 1 Q.B. 23 . . ... ... .. 128

Y

Younie *v.* Tulsiram, [1942] A.I.R. Calc. 382 ... 154, 155, 163
Y. S. Rao *v.* Kandukuri, [1931] A.I.R. Mad. 200 . . . ... 45

ADDENDA.

Howe *v.* Smith, (1884) 27 Ch. D. 89 . . 153, 154, 155, 156, 160, 162
Icely *v.* Grew, (1836) 6 Nev. & M. (K.B.) 467 ... .. 163
Murlidhar *v.* International Film Co. Ltd., [1948] A.I.R. P.C. 34 (38, 39) 160
The Irrawaddy Flotilla Company *v.* Bugwandas, (1891) I.L.R. 18 Calc. 620 158

The Calcutta Law Journal

VOL. 88.] CALCUTTA. 1

## SUPREME COURT.

Present: *The Hon'ble Sri Saiyid Fazl Ali, The Hon'ble Sri Bijan Kumar Mukherjea and The Hon'ble Sri N. Chandrasekhara Aiyar.*

CIVIL.

1950.

*November, 14*

## RAM GOPAL

*v.*

## NAND LAL AND OTHERS.[*]

*Hindu law—Grant of property to a female relation—Power of alienation, if expressly to be given to create absolute estate—Words of sufficient amplitude for conveying full rights—Making the grantee a "Malik" is clear enough to convey absolute estate.*

Grant of immoveable property to a Hindu female does not warrant a proposition of law that the donee does not get an absolute interest unless expressly conferred by the grant. Grant without express words of inheritance, in the absence of a conflicting context, carry an estate of inheritance. Unless the gift is shown to be limited or carries a restricted interest as in Widows' Estate, a gift carries with it an absolute interest in the donee. Therefore, to convey an absolute estate to a Hindu female no express power of alienation need be given.

*Kollany Kooer* v. *Luchmee Pershad* (1) approved.

*Tagore* v. *Tagore* (2) and *Sasiman Chowdhurain* v. *Shib Narayan* (3) followed.

Appeal by the Defendant.

Suit for recovery of possession of a residential house and a shop in the town of Etawah.

[*] Civil Appeal No 59 of 1949 from the judgment dated 6-9-1948 of the High Court of Judicature at Allahabad in F.A. No. 5 of 1940.

(1) (1875) 24 W.R. 395.
(2) (1872) I. R. I.A. Supp. 47 (65).
(3) (1921) L. R. 49 I A. 25 (35).

CIVIL.

1950.

Ram Gopal v. Nand Lal and others.

The material facts will appear from the judgments.

*Mr. P. L. Banerjee, Senior Advocate* (*Mr. B. Banerji, Advocate* with him) instructed by *Mr. R. K. Kuba, Agent* for the Appellant.

*Mr. S. P. Sinha, Senior Advocate* (*Mr. N. C. Sen, Advocate* with him) instructed by *Mr. S. P. Varma, Agent* for the Respondents.

The judgments of the Court were as follows:—

*November, 14.*

**B. K. Mukherjea, J.:**—This appeal is directed against an appellate judgment of a Division Bench of the Allahabad High Court dated September 6, 1943, by which the learned Judges reversed a decision of the Civil Judge, Etawah made in Original Suit No. 28 of 136.

The suit was one commenced by the plaintiff, who is respondent No. 1 in this appeal, for recovery of possession of two items of immovable property—one a residential house and other a shop—both of which are situated in the town of Etawah. The properties admittedly formed part of the estate of one Mangal Sen who died sometime towards the end of the last century, leaving behind him, as his heirs, his two widows Mst. Mithani and Mst. Rani. Mangal Sen had a son named Chedi Lal and a daughter named Janki Kuar born of his wife Mst. Rani, but both of them died during his lifetime. Chhedi Lal had no issue and he was survived by his widow Mst. Meria, while Janki left a son named Thakur Prasad. Janki's husband married another wife and by her got a son named Babu Ram. On Mangal Sen's death, his properties devolved upon his two widows, and Mst. Rani having died subsequently, Mst. Mithani came to hold the entire estate of her husband in the restricted rights of a Hindu widow. On 27th November 1919, Mst. Mithani surrendered the whole estate of her husband by a deed of gift in favour of Thakur Prasad who was the nearest reversioner at that time. Thakur Prasad died in 1921, leaving a minor son named Nand Lal who succeeded to his properties and this Nand Lal is the plaintiff in the suit out of which this appeal arises. On 27th October 1921, there was a transaction entered into between Babu Ram on his own behalf as well as guardian of infant

Nand Lal on the one hand and Mst. Meria, the widow of Chhedi Lal on the other, by which two items of property which are the subject matter of the present litigation were conveyed to Meria by a deed of transfer which has been described as a Tamliknama; and she on her part executed a deed of relinquishment renouncing her claims to every portion of the estate left by Mangal Sen. It is not disputed that Meria took possession of the properties on the basis of the Tamliknama and on 10th April 1928 she executed a will, by which these properties were bequeathed to her three nephews, who are the sons of her brother Sunder Lal. Meria died on 19th June 1934. One Ram Dayal had obtained a money decree against Sunder Lal and his three sons, and in execution of that decree the properties in suit were attached and put up to sale and they were purchased by Ram Dayal himself on 30th January 1934. On 1st June 1936, the present suit was instituted by Nand Lal and he prayed for recovery of possession of these two items of property on the allegation that as they were given to Mst. Meria for her maintenance and residence, she could enjoy the same only so long as she lived and after her death, they reverted to the plaintiff. Sunder Lal, the brother of Meria, was made the first defendant in the suit, and his three sons figured as defendants Nos. 2 to 4. Defendant No. 5 is a lady named Chimman Kunwar, in whose favour Sunder Lal was alleged to have executed a deed to transfer in respect of a portion of the disputed property. Ram Dayal, the decreeholder auction purchaser, died in May 1935 and his properties vested in his daughter's son Ram Gopal under a deed of gift executed by him in favour of the latter. On 1st September 1938, Ram Gopal was added as a party defendant to the suit on the plaintiff's application and he is defendant No. 6. The two other defendants, namely, defendants 7 and 8, who were also made parties at the same time, are respectively the widow and an alleged adopted son of Ram Dayal.

The suit was contested primarily by defendant No. 6, and the substantial contentions raised by him in his written statement were of a two-fold character. The first and the main contention was that Mst. Meria got an absolute title to the disputed properties on the strength of the 'Tamliknama' executed in her favour by the guardian of the plaintiff and after her death, the properties passed on to the three sons of Sunder

CIVIL
1950
Ram Gopal
v.
Nand Lal and others.
Mukherjea, J.

Lal who were the legatees under her will. Ram Dayal, it was said, having purchased these properties in execution of a money decree against Sunder Lal and his three sons acquired a valid title to them. The other contention raised was that the suit was barred by limitation. The trial Judge decided both these points in favour of the contesting defendant and dismissed the plaintiff's suit. On appeal to the High Court, the judgment of the Civil Judge was set aside and the plaintiff's suit was decreed.

The defendant No. 6 has now come up on appeal to this court and Mr. Peary Lal Banerjee, who appeared in support of the appeal pressed before us both the points upon which the decision of the High Court has been adverse to his client.

The first point raised by Mr. Banerjee turns upon the construction to be placed upon the document executed by Babu Ram on his own behalf as well as on behalf of Nand Lal then an infant, by which the properties in dispute were transferred to Mst. Meria by way of a 'Tamliknama.' The question is whether the transferee got, under it, an absolute interest in the properties, which was heritable and alienable or was it the interest of a life tenant merely. The document is by no means a complicated one. It begins by a recital of the events under which Nand Lal became the sole owner of the properties left by Mangal Sen and refers in this connection to the obligation on the part of both Babu Ram and Nand Lal to "support maintain and console" Mst. Meria, the widow of the pre-deceased son of Mangal Sen. The document then proceeds to state as follows:

"I have therefore, of my own accord and free will, without any compulsion or coercion on the part of any one else while in my proper senses made a Tamlik of a double-storied pucca built shop.....and a house and a kothri in Etawah..... worth Rs. 8,000 for purposes of residence of the Musammat, owned by the minor aforesaid.....which at present stands let out on rent to Sunder Lal, brother of Mst. Meria aforesaid ...in favour of Mst. Meria aforesaid, widow of Chhedi Lal and made her the owner (Malik). If any portion or the whole of the property made a Tamlik of for the purpose mentioned above passes out of the possession of the Musammat aforesaid

on account of the claim of Nand Lal minor aforesaid, I and my property of every sort shall be responsible and liable for the same."

This document has got to be read along with the deed of relinquishment, which is a contemporaneous document executed by Meria renouncing all her claims to the property left by Mangal Sen. The deed of relinquishment like the Tamliknama recites elaborately, with reference to previous events, particularly to the deed of gift executed by Mst. Mithani in favour of Thakur Prasad, the gradual devolution of the entire estate of Mangal Sen upon Nand Lal. It states thereafter that Babu Ram, as the guardian of the minor and also in his own right, "has under a Tamlikhama dated this day made a 'Tamlik' in my favour of a shop along with a Balakhana and a kota for my maintenance and a house .....for purpose of my residence which are quite sufficient for my maintenance." "I have therefore, of my own accord," the document goes on to say, "made a relinquishment of the entire property aforesaid mentioned in the deed of gift. .....worth Rs. 25,000. I do covenant and do give in writing that I have and shall have no claim to or concern with the property.....belonging to the minor aforesaid, nor has the property aforesaid remained subject to my maintenance allowance nor shall I bring any claim at any time." The schedule to the instrument, it may be noted, gives a list of all the properties of Mangal Sen in respect to which Mst. Mithani executed a deed of gift in favour of Thakur Prasad, including the two items of property covered by the "Tamliknama" mentioned aforesaid.

In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words which have actually been employed *Rajendra Prasad* v. *Gopal Prasad*, (1). In the present case the instrument of grant has been described as a 'Tamliknama' which means a document by which 'Maliki' or ownership rights are transferred and the document expressly says that the grantee has been made a 'Malik' or owner. There are no

(1) (1930) L.R. 57 I.A. 296.

CIVIL.

1959.

Ram Gopal v. Nand Lal and others.

*Mukherjea, J.*

express words making the gift heritable and transferable; nor on the other hand is there any statement that the transferee would enjoy the properties only during her life-time and that they would revert to the grantor after her death.

It may be taken to be quite settled that there is no warrant for the proposition of law that when a grant of an immovable property is made to a Hindu female, she does not get an absolute or alienable interest in such property, unless such power is expressly conferred upon her. The reasoning adopted by Mr. Justice Mitter of the Calcutta High Court in *Kollany Kooer* v. *Luchmee Pershad* (1) which was approved of and accepted by the Judicial Committee in a number of decisions, seems to me to be unassailable. It was held by the Privy Council as early as in the case of *Tagore* v. *Tagore* (2) that if an estate were given to a man without express words of inheritance, it would, in the absence of a conflicting context, carry, by Hindu Law, an estate of inheritance. This is the general principle of law which is recognised and embodied in section 8 of the Transfer of Property Act and unless it is shown that under Hindu Law a gift to a female means a limited gift or carries with it the restrictions or disabilities similar to those that exist in a 'widow's estate,' there is no justification for departing from this principle. There is certainly no such provision in Hindu Law and no text could be supplied in support of the same.

The position, therefore, is that to convey an absolute estate to a Hindu female, no express power of alienation need be given; it is enough if words are used of such amplitude as would convey full rights of ownership.

Mr. Banerjee naturally lays stress upon the description of the document as 'Tamliknama' and the use of the word 'Malik' or owner in reference to the interest which it purports to convey to the transferee. The word 'Malik' is of very common use in many parts of India and it cannot certainly be regarded as a technical term of conveyancing. In the language of the Privy Council, the term 'Malik' when used in a will or other document "as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner

(1) (1875) 24 W.R. 395.

(2) (1872) L R I.A. Supp. 47 (65).

possessed of full proprietory rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietory rights were not intended to be conferred". *Sasiman Choudhurain* v. *Shib Narayan* (1). This I think to be a perfectly correct statement of law and I only desire to add that it should be taken with the caution which the Judicial Committee uttered in course of the same observation that "the meaing of every word in an Indian document must always depend upon the setting in which it is placed, the subject to which it is related and the locality of the grantor from which it receives its true shade of meaning."

The question before us, therefore, narrows down to this as to whether in the present case there is anything in the context of these two connected instruments or in the surrounding circumstances to cut down the full proprietory rights that the word 'Malik' ordinarily imports.

The High Court in reaching its decision adverse to the appellant laid great stress on the fact that the grant was expressed to be for maintenance and residence of Mst. Meria This, it is said, would *prima facie* indicate that the grant was to enure for the life-time of the grantee. It is pointed out by the learned Judges that the language of the document does not show that anybody else besides the lady herself was to be benefited by the grant and indemnity given by Babu Ram was also given to the lady personally. It is further said that if Meria was given an absolute estate in the properties comprised in the 'Tamliknama,' there was no necessity for including these two properties again in the deed of relinquishment which she executed at the same time.

I do not think that the mere fact that the gift of property is made for the support and maintenance of a female relation could be taken to be a *prima facie* indication of the intention of the donor, that the donee was to enjoy the property only during her life-time. The extent of interest, which the donee is to take, depends upon the intention of the donor as expressed by the language used, and if the dispositive words employed in the document are clear and unambiguous and import absolute

(1) (1911) L.R. 49 I A. 25 (35).

CIVIL.

1950.

Ram Gopal v. Nand Lal and others.

*Mukherjea, J.*

ownership, the purpose of the grant would not, by itself, restrict or cut down the interest. The desire to provide maintenance or residence of the donee would only show the motive which prompted the donor to make the gift, but it could not be read as a measure of the extent of the gift. This was laid down in clear terms by the Judicial Committee in a comparatively recent case which is to be found reported in *Bishunath Prasad* v. *Chandika* (1): There a Hindu executed a registered deed of gift of certain properties in favour of his daughter-in-law for the "support and maintenance" of his daughter-in-law and declared that the donee should remain absolute owner of the property (malik mustaqil) and pay Government revenue. There were no words in the document expressly making the interest heritable or conferring on the donee the power of making alienation. It was held by the Judicial Committee that the donee took under the document, an absolute estate with powers to make alienation giving title valid after her death. In course of the judgment, Lord Blanesburgh quoted, with approval, an earlier decision of the Judicial Committee, where the words "for your maintenance" occurring in a deed of gift were held insufficient to cut down to life interest the estate taken by the donees. These words, it was said, "are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort and do not necessarily mean that it was to be limited to a bare right of maintenance."

On behalf of the respondent, reliance was placed upon the decision of the Judicial Committee in *Rajah Rameshar Baksh* v. *Arjun* (2) in support of the contention that in a maintenance grant it is the *prima facie* intention of the gift that it should be for life. In my opinion, the decision cited is no authority for the general proposition as is contended for by the learned Counsel for the respondent, and it is to be read in the context of the actual facts of the case which relate to grants of a particular type with special features of its own. It was a case where a Talukdar made a grant of certain villages to a junior member of the joint family for maintenance of the latter. The family was governed by the law of primogeniture and the estate descended to a single heir. In such cases the usual custom is that the junior members

(1) (1932) L.R. 60 I.A. 56.

(2) (1900) L.R 28 I.A. 1.

of the family, who can get no share in the property, are entitled to provisions by way of maintenance for which assignments of lands are generally made in their favour. The extent of interest taken by the grantee in the assigned lands depends entirely upon the circumstances of the particular case, or rather upon the usage that prevail in the particular family. In the case before the Privy Council there was actually no deed of transfer. It was an oral assignment made by the Talukdar and the nature of the grant had to be determined upon the recitals of a petition for mutation of names made to the Revenue Department by the grantor after the verbal assignment was made and from other facts and circumstances of the case. The case of *Woodoyaditto Dev* v. *Mukoond* (1), which was referred to and relied upon in the judgment of the Privy Council, was also a case of maintenance or *khor phos* grant made in favour of a junior member of the family, where the estate was impartible and descended under the rules of primogeniture. It was held in that case that such grants, the object of which was to make suitable provisions for the immediate members of the family, were by their very nature and also under the custom of the land resumable by the zemindar on the death of the grantee, as otherwise the whole zemindary would be swallowed up by continual demands. This principle has obviously no application to cases of the type which we have before us and it was never so applied by the Privy Council, as would appear from the decision referred to above.

The learned Counsel for the plaintiff respondent drew our attention in this connection, to the fact that the properties given by the 'Tamliknama' were valued at Rs. 8,000, whereas the entire estate left by Mangal Sen was worth Rs. 25,000 only. It is argued that the transfer of nearly one-third of the entire estate in absolute right to one who was entitled to maintenance merely, is, on the face of it, against probability and common sense. I do not think that, on the facts of this case, any weight could be attached to this argument. In the first place, it is to be noted that whatever might have been the actual market value of the properties, what the widow got under the Tamliknama was a residential house and a shop, and the shop was the only property which fetched any income. This shop, it appears, was all along in possession of Sunder Lal, the brother of Meria, and the rent, which he paid or promised to pay in respect of the same,

(1) (1874) 22 W.R. 225.

CIVIL.

1950.

Ram Gopal v. Nand Lal and others.

*Mukherjea, J.*

was only Rs. 12 a month. So from the income of this property it was hardly possible for Meria to have even a bare maintenance, and this would rather support the inference that the properties were given to her absolutely and not for enjoyment merely so long as she lived.

But what is more important is, that the object of creating these two documents, as the surrounding circumstances show, was not merely to make provision for the maintenance of Mst. Meria; the other and the more important object was to perfect the title of Nand Lal to the estate left by Mangal Sen and to quiet all disputes that might arise in respect of the same. It may be that Mst. Meria could not, in law, claim anything more than a right to be maintained out of the estate of her deceased father-in-law. But it is clear that whatever her legal rights might have been, Nand Lal's own position as the sole owner of the properties left by Mangal Sen was not altogether undisputed or free from any hostile attack. As has been said already, Sunder Lal, the brother of Meria, was in occupation of the double-storied shop from long before the Tamliknama was executed and Meria got any legal title to it. It appears from the record that in 1920 a suit was instituted on behalf of the infant Nand Lal for evicting Sunder Lal from the shop and the allegation in the plaint was that Sunder Lal was occupying the property as a tenant since the time of Mst. Mithani by taking a settlement from her. Sunder Lal in his written statement filed in that suit expressly repudiated the allegation of tenancy and also the title of Nand Lal and openly asserted that it was Mst. Meria who was the actual owner of Mangal Sen's estate. The suit ended in a compromise arrived at through the medium of arbitrators and the result was that although Sunder Lal admitted the title of the plaintiff, the latter had to abandon the claims which were made in the plaint for rents, costs and damages. Sunder Lal continued to be in occupation of the shop and executed a rent agreement in respect of the same in favour of Nand Lal promising to pay a rent of Rs. 12 per month. A few months later, the Tamliknama was executed and this shop along with the residential house were given to Meria in *maliki* right. The recitals in both the Tamliknama and the deed of relinquishment clearly indicate that the supreme anxiety on the part of Babu Ram, who was trying his best to safe-guard the interests of the minor, was to

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NOT TO BE REMOVED

CIVIL.

1950.

Ram Gopal
v.
Nand Lal and
others.

Mukherjea, J.

put an end to all further disputes that might be raised by or on behalf of Mst. Meria with regard to the rights of Nand Lal to the properties of Mangal Sen and to make his title to the same absolutely impeccable. That seems to be the reason why Meria was given a comparatively large portion of the properties left by Mangal Sen which would enable her to live in comfort and her interest was not limited to a bare right of maintenance. It is significant to note that the shop room, which was all along in possession of Sunder Lal was included in this Tamliknama and soon after the grant was made, Sunder Lal executed a rent agreement in respect of the shop in favour of Mst. Meria acknowledging her to be the owner of the property.

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It is true that the document does not make any reference to the heirs of Meria, but that is not at all necessary, nor is it essential that any express power of alienation should be given. The word "Malik" is too common an expression in this part of the country and its meaning and implications were fairly well settled by judicial pronouncements long before the document was executed. If really the grantee was intended to have only a life interest in the properties, there was no lack of appropriate words, perfectly well known in the locality, to express such intention.

The High Court seems to have been influenced to some extent by the fact that in the Tamliknama there was a guarantee given by Babu Ram to Meria herself and to no one else agreeing to compensate her in case she was dispossessed from the properties at the instance of Nand Lal. This covenant in the document was in the nature of a personal guarantee given by Babu Ram to Mst. Meria for the simple reason that the property belonged to an infant and it was as guardian of the minor that Babu Ram was purporting to act. It was too much to expect that Babu Ram would bind himself for all time to come and give a guarantee to the future heirs of Meria as well. Probably no such thing was contemplated by the parties and no such undertaking was insisted upon by the other side. But whatever the reason might be which led to the covenant being expressed in this particular form, I do not think that it has even a remote bearing on the question that arises for our consideration in the present case. It is of no assistance to the plaintiff in support of the construction that is sought to be put upon the document on his behalf.

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CIVIL.

1959.

Ram Gopal v. Nand Lal and others.

*Mukherjea, J.*

I am also not at all impressed by the other fact referred to in the judgment of the High Court that if the properties were given to Meria in absolute right, there was no necessity for including them again in the schedule to the deed of relinquishment which Meria executed. I fail to see how the inclusion of the properties in the deed of relinquishment would go to indicate that Meria's rights to these properties were of a restricted and not an absolute character. It is after all a pure matter of conveyancing and the two documents have to be read together as parts of one and the same transaction. Under the 'Tamliknama.' Meria got two properties in absolute right out of the estate of Mangal Sen. By the deed of relinquishment, she renounced her claim for maintenance in respect of all the properties left by Mangal Sen including the two items which she got under the 'Tamliknama.' After the 'Tamliknama' was executed in her favour, there was no further question of her claiming any right of maintenance in respect of these two items of property. She became the absolute owner thereof in exchange of her rights of maintenance over the entire estate and this right of maintenance she gave up by the deed of relinquishment. On a construction of the entire document, my conclusion is that there is nothing in the context of the document, or in the surrounding circumstances which would displace the presumption of full proprietory rights which the use of the word "Malik" is apt ordinarily to convey. The first contention of the appellant, therefore, succeeds and in view of my decision on this point, the second question does not arise for determination at all.

The result is that the appeal is allowed, the judgment and decree of the High Court are set aside and those of the trial Judge restored. The defendant No. 6 will have his costs from the plaintiff in all the courts. There will be no order for costs as regards the other parties.

**Fazl Ali, J.:**—I agree with the judgment delivered by my learned brother Mukherjea J.

**Chandrasekhara Aiyar, J.:**—During the hearing of the appeal I entertained doubts whether the view taken by the High Court was not correct. But on further consideration, I find that it cannot be maintained, having regard to the terms of the

'Tamliknama' (deed of transfer) in favour of Musammat Meria and the context in which it came into existence. The name of the document or deed does not very much matter. Though the word 'malik' is not a term of art, it has been held in quite a large number of cases, decided mostly by the Judicial Committee of the Privy Council, that the word, as employed in Indian documents, means absolute owner and that unless the context indicated a different meaning, its use would be sufficient to convey a full title even without the addition of the words, 'heirs,' or 'son,' 'grandson' and 'great grandson.' Of course, if there are other clauses in the document which control the import of the word and restrict the estate to a limited one, we must give the narrower meaning; otherwise the word must receive its full significance. Especially is this so, when the rule of interpretation laid down in *Mahomed Shumsool* v. *Shewukram* (1) has come to be regarded as unsound.

The language employed in the 'Tamliknama' (Ex. II) is almost similar to the language of the deeds construed in *Bhaidas Shivdas* v. *Bai Gulab & Another* (2) and *Bishunath Prasad Singh* v. *Chandika Prasad Kumari and Others* (3) where is was held that an absolute estate was conveyed.

I agree that the judgment and decree of the High Court should be set aside and that the decree of the trial Judge should be restored with costs to the appellant in all the Courts.

S.D.G

*Appeal allowed.*

(1) (1874) L. R. 2 I. A. 7.
(2) (1921) L.R. 49 I.A 1.
(3) (1932) L.R 60 I.A. 56.

## APPELLATE CRIMINAL.

*Before Mr. Justice K. C. Das Gupta and Mr. Justice P. B. Mukharji.*

CRIMINAL.

1951.

May, 23.

M. C. MITRA

*v.*

THE STATE.*

*Prevention of Corruption Act (II of 1947)—Section 4—Presumption under—Nature of—When arises—How far affects the onus on the prosecution—Section, if applies to unconscious and unknowing transmitter or bearer—Presumption, how rebutted.*

*Indian Penal Code (Act XLV of 1860)—Sections 161, 165—Onus to prove motive and/or inadequacy of consideration—If displaced by Section 4 of the Prevention of Corruption Act.*

*Magistrate—Practice to send Magistrates as witnesses of police traps, deprecated.*

The burden of proving motive or reward under section 161 of the Indian Penal Code or absence or inadequacy of consideration under section 165 of the Indian Penal Code though has been affected by a presumption under section 4 of the Prevention of Corruption Act but that does not mean that the burden to establish the acceptance or the agreement to accept is at all displaced by Section 4 of the Prevention of Corruption Act. It is only when the prosecution has discharged that burden presumption of (a) motive or reward or (b) absence or inadequacy of consideration will be made against the accused.

An unconscious and unknowing transmitter or bearer would not come within section 4 of the Prevention of Corruption Act.

The presumption can be rebutted by oral evidence and also may be by statement under section 342 of the Criminal Procedure Code or by documents produced by the defence or by surrounding circumstances.

It is not enough to say that the Magistrate acting as a witness in a particular case does not himself try that case. To make Magistrates a limb of the Police seriously undermines the independence of the Magistrates and perverts their judicial outlook.

Appeal by the Accused.

Prosecution under section 161 I. P. Code.

* Criminal Appeal No. 158 of 1950 from the judgment and order of the Special Magistrate, Alipore.

CRIMINAL.

1951

M. C. Mitra
v.
The State

The material facts will appear from the judgments.

*Messrs. A. K. Basu, Bireswar Chatterjee* and *Gouri Prosad Mukherjee,* for the Appellant.

*Messrs. Sankar Banerjee,* Standing Counsel, *Chandi Kumar Chatterjee* and *Bibhuti Bhusan Das Gupta,* for the State.

The judgments of the court were as follows—

May, 23.

**P. B. Mukharji, J.:**—This is an appeal from the judgment and order of the Special Judge, Alipore, convicting the appellant of an offence under section 161 I. P. C. and sentencing him to a rigorous imprisonment for 8 months and a fine of Rs. 3,000/- which includes a fine of Rs 2,000/- as required by Section 9(1) of the West Bengal Act XXI of 1949. In default of payment of the fine a further sentence of rigorous imprisonment of 4 months is imposed by the Special Judge.

The case for the prosecution may be stated briefly.

The appellant was at all relevant times the Accounts Officer and Financial Adviser to the Deputy General Manager (Grains), E. I. Railway, Calcutta. In that capacity he is said to have accepted directly from G. H. M. Patel of Messrs. G. C. Bose & Co. a sum of Rs. 2,000/- as gratification with the motive of facilitating the passing of outstanding bills of G. C. Bose & Co. relating to the supply of potatoes and onions to the E. I. Railway Administration.

The prosecution case is based on a police trap laid at the office of the firm of M. G. Corporation in a room on the third floor at 9, Royal Exchange Place, Calcutta, at about 12-45 p.m. The firm of M. G. Corporation is a business concern belonging to the brother of the accused by the name H. K. Mitra. The firm of M. G. Corporation is a business concern belonging to the brother of the accused by the name H. K. Mitra. The office of G. C. Bose & Co. the supplier to the E. I. Railway Administration is also situated in the same building on the first floor at 9, Royal Exchange Place, Calcutta.

CRIMINAL.

1951.

M. C. Mitra
v.
The State.

*Mukherji, J.*

The party consisted of Patel, Magistrate T. P. Mukherjee, Inspector S. B. Mitra accompanied by two Sub-Inspectors of Police. Inspector S. B. Mitra with one Sub-Inspector waited on the verandah at the entrance of the room of M. G. Corporation and another Sub-Inspector was posted on the road side. Patel and Magistrate T. P. Mukherjee went inside the room. The appellant was seated in a chair in that room and his brother H. K. Mitra was seated in a deck chair to his left. There were 2 or 3 other gentlemen working in that room. Patel introduced Magistrate T. P. Mukherjee to the appellant as his friend from Chittagong. The Magistrate took his chair in front of Mitra accross the table and Patel pulled up a chair and sat just by the side of the appellant. Then Patel and the appellant started talking in low tones which the Magistrate could not overhear. After a minute or two the appellant took a piece of paper and started drawing a diagram of the road to his house with reference to Rash Bihari Avenue. The appellant asked the Magistrate if the latter understood the position of his house. Patel and the appellant again started talking in low tones and then Patel brought out the marked G. C. Notes from his pocket and handed the same to the appellant. Patel having made over the Notes walked out of the room. The appellant told something which the Magistrate could not hear. But he saw the appellant handing over these Notes to the brother on the left when the Magistrate stood up disclosing his identity and asking the appellant to desist. The appellant dropped the Notes which fell on the floor just on the side of the chair. Then the Inspector Mitra with his assistant entered the room and challenged the appellant. The Magistrate picked up the 20 Notes from the floor and verified their numbers with the reference to the numbers noted in the petition Ex. 2. The numbers tallied.

That in brief is the prosecution case.

The defence of the appellant admits that these 20 Hundred rupee Notes amounting to Rs 2,000/- were handed over to him by Patel but they were meant for his brother as earnest money for the Match Box tender in which Patel wanted to join his said brother. According to the defence case Patel gave the bundle of Notes to the accused and then the accused handed the money to his brother. The further defence of the appellant

is that he did not hold up the passing of the bills of G. C. Bose & Co. but one Manindra M. Sen Gupta, District Controller of Food Grains, E. I. Railway, Calcutta, did so.

We have perused the entire records of this case and have arrived at our own independent conclusion.

Three outstanding features of this case have not been noticed by the Special Judge.

The foremost among them is that the bribe in this case is said to have been accepted during office hours in a commercial office in a locality like Royal Exchange Place, Calcutta, where inside the office room not only Magistrate T. P. Mukherjee, introduced on the spot as a Chittagong partner of Patel but until then a stranger to the appellant sitting in a chair in front of him was present but there were also present two others apart from the appellant's brother sitting in that room at the crucial time. The evidence discloses that these two others were sitting at a distance of 8 or 9 feet from the appellant. Such a notoriously public place with so ceremonious a setting with strangers all about provides too incongruous a background for acceptance of bribe in a case like this and in our judgment gravely affects the probability of the prosecution case.

The next outstanding fact which the Special Judge failed to notice is that the appellant at the very moment of the incident told the Magistrate T. P. Mukherjee that Patel had seen him on the previous day and agreed to be a partner of M. G. Corporation in the Match Box Tender by paying half the outlay in consideration of half the profits and at that time the accused also said that Rs. 2,000/- had been paid as earnest money for the tender of match box. In our opinion it is difficult to invent a ready made story on the spur of the moment and on the spot then and there that the money was intended for his brother in the match box tender unless it was in fact so. If it was all a case of acceptance of bribe we consider it improbable that the appellant could hit upon that defence immediately at the very moment of the incident. The Special Judge has discussed the probabilities of this case but has completely failed to notice in so doing, how was it that it came to be at all mentioned

CRIMINAL.

1951.

M. C. Mitra
v.
The State.

*Mukharji, J.*

at the earliest moment. This again is a consideration which in our judgment renders the prosecution case less probable and the defence more probable.

The next feature of the case which missed the attention of the Special Judge is how far Patel's association with the appellant is to be believed. In our judgment Patel's association with the appellant requires the closest scrutiny. Not the least peculiar fact in this context is the absence of G. C. Bose himself from the scene set for offering the alleged bribe although it is in evidence that he was present at the time in the same building in his office of M. G. Corporation and the selection of Patel to play the leading role in paying the alleged bribe. According to Patel G. C. Bose and he saw the appellant in his office at Messrs. M. G. Corporation sometime in the first/second/third week of February 1949. When the appellant was supposed to have told Patel and G. C. Bose that he would not pass their bills and impose heavy fines if they did not pay him Rs. 3,000/-. This visit is the most important visit and one of the central facts on which the whole evidence of Patel hangs. But in the first information report to the Superintendent of Police made by Patel on the 16th March 1949 and marked Ex. 1 Patel does not mention this fact at all that he went to the appellant in the company of G. C. Bose. Of course between G. C. Bose and Patel in their evidence they have supported each other on this question. But the fact remains that Patel's omission to report this very important visit in the company of G. C. Bose was not noticed by the Special Judge. There is another reason why in our judgment Patel's evidence is not trustworthy. Patel has denied in evidence that he knew of the tender of the match box. In fact his evidence is "I do not know anything about the tender." Being pressed in cross-examination on this point in paragraph 35 of his deposition he was forced to say this "The accused told me that he has earned some money over a contract of match box. This he told me sometime in February 1949." If Patel was not concerned at all with the match box tender what then could be the occasion at all for the appellant to tell Patel about the match box tender. Why should the appellant go out of his way to tell Patel about it. That he told Patel about it is admitted by Patel himself. It can only be consistent and probable with the defence version that Patel wanted to join in as a partner with M. G. Corporation

in the tender for match box. Add to this the fact that there was actually a Press notice issued on the 7th March 1949 marked Ex. A by which the tender notice was issued to the Press for publication on the 12th, 13th and 14th March, 1949. The notice itself called for tender and said that the tender should reach by the 18th March 1949. This in our judgment makes the defence more probable and the prosecution case as based on the evidence of Patel improbable.

The motive alleged in the charge against the appellant for this offence is "facilitating the passing of outstanding bill of Messrs. G. C. Bose & Co. relating to the supply of potatoes and onions to the E. I. Railway Administration." In the hierarchy of officers the person to deal with these food grains contract is Manindra M. Sen Gupta the District Controller of Food Grains. It is only when there is any complaint that the matter reaches the appellant as the Accounts Officer and Financial Adviser to the Deputy General Manager (Grains). On this point, the controversy between Sen Gupta and appellant boils down to a point of interpretation. G. C. Bose & Co. failed to supply according to the contract potatoes and onions. These are perishable commodities. According to Sen Gupta such failure to supply was to be penalised by ½% penalty on the value leviable for delay in the supply. The principle is that a penalty is imposed on ½% of the value for each day's delay in the supply. In other words this only applied in the case of delayed supply and not in the case of non-supply. Sen Gupta realised that this principle could not in terms be applied to these contracts for perishable commodities which were governed by other terms that we shall presently mention. That is why Sen Gupta in his note of 25-8-48 in paragraph 5 marked Ex. H/8 spoke of applying it by "analogy." Sen Gupta's view was put down clearly in Ex. 6/10/1. The appellant's construction was that Sen Gupta was entirely wrong. The contract for supply of potatoes and onions was governed by Ex. B which sets out the terms and conditions and clause 8 of such terms and conditions provide:

> "Time for completion of delivery should be deemed to be the essence of the contract. If the required quantities are not supplied on any day or days during the currency of the contract the Railway Administration will be at

CRIMINAL.

1951.

M. C. Mitra v. The State.

*Mukherji, J.*

liberty to (a) purchase elsewhere on the account and in the risk of the suppliers the undelivered quantity or quantities without any notice to the supplier any extra cost that may thus be incurred and/or (b) forfeit the security deposit in whole or in part at the discretion of the Railway Administration."

It was therefore in this case a question of either of the risk purchase or forfeiture of deposit in whole or in part. According to Sen Gupta's interpretation on the basis of Ex. 6/10/1 the penalty only came to a nominal amount of Rs. 7-12-0 and according to the appellant it was likely to make forfeiture of whole or part of the security deposit which was Rs. 5,000/-. We have no hesitation on the question of construction of the contract to say that the appellant's interpretation is the correct one having regard to the terms of the contract and the Special Judge was entirely wrong in saying that Sen Gupta's interpretation was correct. Ultimately it was the appellant's construction which was accepted by the Railway Administration. But this strikes at the very root of the prosecution case regarding motive because the appellant by insisting on forfeiture as a penalty for non-supply did not stand to gain anything by the proposed bribe. In fact as Ex. 8/8 under date 15-3-49 shows the appellant said that he had no objection, as indeed he could not have because that was exactly what he had all along been contending for. Therefore the incident of 15-3-49 as shown by its result in Ex. 8/8 under that date cannot be said to support the prosecution case that the appellant was holding up the outstanding bills in the hope of getting the bribe, so that if he got the bribe then he would decide in favour of ½% penalty for the delay in supply and would not impose forfeiture of deposit. Besides the tearing of the bottom of the page of Ex. 6/10/1 which in its present form bears neither date nor the initials of Sen Gupta, raises grave suspicion about this document. Then the defence suggestion that the words in Ex. 6/4 "should we not pay for actual supply" are a later interpolation having regard to the first part of the query and its answer already given on the note cannot be brushed aside as totally unfounded. It gives rise to reasonable doubts.

For these reasons I would give the benefit of doubt to the appellant and acquit him of the charge.

It is necessary to refer to one aspect of this case which has been stressed by the learned Standing Counsel appearing for the State. It is argued that the appellant dropped the Notes on the floor according to the evidence of Magistrate T. P. Mukherjee. But he also said in cross-examination that the brother of the accused actually stretched his hand to receive the Notes. In paragraph 7 of the deposition of the Magistrate T. P. Mukherjee this is what he says " the dropping of the Notes by the accused and withdrawal of his hand by his brother were simultaneous." In that context therefore the dropping of the Notes by the appellant on the floor is not inconsistent with the defence version and reasonable probability that they were meant for his brother who actually extended his hand to receive them. Therefore the fact that the Notes dropped on the floor does not lead to the irresistible conclusion showing the accused guilty and it will be too slender and unsafe a piece of evidence on which to hold the accused guilty.

A good deal of comment has also been made that the defence did not call H. K. Mitra the brother of the appellant to give evidence who could have spoken of the contract for match boxes. It is not clear to us how much he could have said if it was the appellant who was arranging to help Patel become a partner of his brother.

This point is of importance by reason of the special provision in the Prevention of Corruption Act, 1947, regarding the presumption against the accused.

It is contended on behalf of the State that having regard to section 4 of the Prevention of Corruption Act, 1947, the onus was upon the accused to call evidence and in so far as he has failed to do so the offence is proved against the appellant. This is a question of very large importance and of great practical significance in corruption cases. It is essential to study the language of this section of the Statute in order to find out what is the actual position of the accused under the Statute. Presumption under this section arises only upon " proof " that the accused person has accepted or agreed to accept or obtained or attempts to obtain for himself or any other person any gratification or any valuable thing from any person. Such pre-

CRIMINAL.

1951.

M. C. Mitra
v.
The State.

*Mukharji, J.*

sumption overrides Sections 101 to 114 of the Indian Evidence Act relating to the burden of proof and presumptions. But this statutory presumption under section 4 of the Prevention of Corruption Act, 1947, is only with regard to motive or reward mentioned in Section 161 of the Indian Penal Code or with regard to absence or inadequacy of consideration presumably with reference to section 165 of the I. P. C. Ordinarily the prosecution would be liable to prove the motive or reward under section 161 I. P. C. or absence or inadequacy of consideration under section 165 I. P. C. because such motive or reward or such absence or inadequacy of consideration forms part of the very offence of section 161 I. P. C or section 165 I. P. C. respectively. But now by reason of section 4 of the Prevention of Corruption Act that presumption will be made against the accused the moment the prosecution proves that the accused accepted or agreed to accept or obtained or attempted to obtain any gratification or valuable thing.

In my judgment this does not mean that the burden of proof on the prosecution to establish the acceptance or the agreement to accept or the obtaining or the agreement to obtain the gratification or the valuable thing is at all displaced by this Section. That burden still remains on the prosecution and it is only when the prosecution has discharged that burden that the presumption of (a) motive or reward or (b) absence or inadequacy of consideration will be made against the accused. But not until then such presumption will be made against the accused. Notwithstanding section 4 of the Prevention of Corruption Act, 1947, the burden still remains upon the prosecution to prove first that the accused has accepted or agreed to accept or has obtained or agreed to obtain a gratification or a valuable thing and this proof must be in accordance with the standard of proof laid down by Section 3 of the Indian Evidence Act. The learned Standing Counsel argued that it was no longer necessary to prove even this and only about 50% or a lower standard of proof would be sufficient. I entirely reject that argument. Proof here in my opinion has only one standard and that is provided by Section 3 of the Evidence Act. I am not prepared to accept any other standard of proof by percentage or plausibility.

Then again the question arises in this case as to how far section 4 of the Prevention of Corruption Act applies to the case of a person through whom money passes. In this case as has been found although the money was handed over to the appellant he was passing it along immediately to his brother. Now the words of this section of the Statute are "for himself or for any other person." Therefore even if one accepts the gratification or the valuable thing for any other person he comes within the plain meaning of these words. But an unconscious and unknowing transmitter or bearer would not in my view come within this section. Suppose for instance any postal or railway authority or any other carrier or agent who is asked to accept and to carry money or valuable thing without knowing that it is a bribe for somebody else he cannot in my view be said to have accepted the bribe or the valuable thing for any other person within the meaning of this section. There must go along with the idea of acceptance a conscious mind that the gratification or the valuable thing is for another person, before such acceptance can come within the operation of this section

The presumption against the accused under section 4 of the Prevention of Corruption Act, 1947, regarding the motive or reward or the absence or inadequacy of the consideration is a rebuttable presumption. That presumption may be rebutted by the accused not only by any oral testimony or witnesses called on behalf of the accused but also by statement of the accused under section 342 of the Cr. P. C. and by any document produced on behalf of the defence of the accused or by the surrounding circumstances. In this case presumption against the appellant with regard to the motive has in my judgment been replaced or rebutted by the fact of the match-box tender referred to not only by the statement of the accused under section 342 Cr. P. C. but also by Ex. A and the surrounding circumstances.

I have carefully perused the decisions of this Court on cognate subjects in *Chang Chung Ching* v. *King Emperor* (1), *The King* v. *Blythe* (2) and the decision of *The King* v. *S. C. Mitter* (3), as well as the decision of the Allahabad High Court

(1) (1944) 49 C.W.N. 229 (2) (1949) 53 C.W.N. 887

(3) (1950) Judgment of *K. C. Das Gupta, J.* in Cr. Appeal No. 256 of 1949 dated 5-8-50.

CRIMINAL.

1951.

M. C. Mitra
v.
The State.

*Mukherji, J.*

in *Promod* v. *Rex* (1). Nothing in these decisions appears to conflict with the view that I have taken. It was observed by the English Court of Appeal in *Rex* v. *Carr Briant* (2). dealing with Prevention of Corruption Act of 1916 in England that where either by Statute or Common Law some matter is presumed against the accused "unless the contrary is proved" the Jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish. This applies here with equal if not greater force on the facts of the case as I hold "the contrary is proved." Like the English Statute the accused here is called upon "to prove the contrary" and it is enough for him if he rebuts the presumption, and the proof of the contrary is proof according to section 5 of the Evidence Act.

Before I conclude I wish to express this Court's great disapprobation of the practice that seems to have become very frequent of sending Magistrates as witnesses of police traps. The Magistrate is made to go under disguise to witness the trap incident laid by the police. In this case it was a Presidency Magistrate and in other cases which have come to our notice there have been other Magistrates who become such witnesses. To make the Magistrate a party or a limb of the police during the police investigation seriously undermines the independence of the Magistrates and perverts their judicial outlook. The Magistrates are the normal custodians of the general administration of criminal justice and it is they who normally decide and pass judgments on the acts and conduct of the police. It is not enough to say therefore that the Magistrate acting as a witness in a particular case does not himself try that case. This practice is all the more indefensible here in this country specially when there is no separation of the Executive from the Judiciary. The basic merit of the administration of criminal justice in the State lies in the fact that the person arrested by the police is entitled to come before an independent and impartial Magistrate who is expected to deal with the case, without the Magistrate himself

(1) (1949) 52 Cr. L. J. 197.
(2) [1943] 1 K.B 607.

being in any way a partisan or a witness to police activities. There is another danger and that is the Magistrates are put in the unenviable and embarrassing position of having to give evidence as witness and then being disbelieved. That is not the way to secure respect for the magistracy charged with the administration of justice. In my judgment it is a practice which is unfair to the accused and unfair to the Magistrates. It is also unfair to the police. Because charged with the high responsibility and duty of performing a great and essential public service of the State the police cannot afford to run the risk of the opprobrium, even if unfounded, that they have enlisted the Magistrate in their cause. That risk is too great and involves forfeiting public respect and confidence. The learned Standing Counsel for the State attempted a comparison with Income Tax Officers who carry on their own investigation. But that is to compare the incomparable. One of the essential securities of a free people is that those who detect crimes shall not be those who try them. A sound and impartial administration of criminal justice in the country demands an independent and untramelled magistracy free from even the slightest breath of police tutelage.

The Appeal is allowed The order of conviction and sentence of the Special Judge is therefore set aside and the appellant acquitted of the charge. He is directed to be discharged from his bailbond.

**K. C. Das Gupta, J.:**—I agree that this appeal be allowed and the order of conviction and sentence of the appellant be set aside and the appellant be acquitted. My learned brother has given detailed reasons for the conclusion that the order of conviction cannot be sustained, and I entirely agree with them. It is very clear that assuming that the appellant did accept certain monies for another person he has proved to the satisfaction of the Court that the money was received by him not as a bribe for himself but as earnest money for his brother. This is sufficient to show that the appellant has been wrongly convicted.

CRIMINAL.

1951.

M. C. Mitra
v.
The State.

*Mukharji, J.*

I agree entirely with the observations made by my learned brother as regards the undesirability of the practice which has recently sprung up of using Magistrates of the land to work as part of the police machinery. It is a matter of great concern to this Court that Magistrates who are to administer justice allow themselves to be used as a limb of the police. As my learned brother has pointed out, it becomes very difficult, if not impossible, for a Magistrate who has worked as part of the police machinery to bring an unbiassed mind to the consideration of problem in which the police are concerned. It is equally clear that when Magistrates act in this manner the people who appear before them lose all respect in them and reasonably apprehend that such Magistrates are merely a part of the police. It is unfortunate that in this case the Chief Presidency Magistrate passed an order directing the Magistrate Mr. T. P. Mukherjee to comply with the police request to witness the payment of the bribe. It seems to me to be doubtful if the C. P. M. in his capacity as a Superior Magistrate has any right to ask the other Presidency Magistrate to work in this manner as a limb of the police We are conscious that so long as the directive principle of the Constitution for separation of the judiciary from the executive is not acted upon there will always remain the risk of the magistracy not being independent. That is no reason however that the Chief Presidency Magistrate himself would take a step which is calculated to throw grave doubt on the independence of the judiciary. There may be some who in excess of zeal for the success of the executive department of the Government think that it is right and proper that the judiciary should not be independent of the executive. We in this Court can never accept that proposition as correct. We are convinced that the interests of the country no less than the administration of justice demand that the judiciary should be independent of the executive. Indeed to say otherwise would be to throw doubt on the wisdom of the Constitution of India which it is our right and duty to guard. The importance of these principles should not be overlooked by the Chief Presidency Magistrate or other Magistrates who may be requested by high police officials to lend the services of the Magistrates to work as part of the police.

Let a copy of our observation on this matter be sent to the Judicial Secretary to the Government of West Bengal.

S.D.G. *Appeal allowed.*

## ORIGINAL CIVIL.

*Before the Hon'ble Mr. Justice D. N. Sinha.*

PYARI CHURN LAW AND ANOTHER
*v.*
MONMOTHA NATH BANERJEE AND OTHERS.*

CIVIL.
1951.
*June, 11.*

*Civil Procedure Code (Act V of 1908)—Order XXI rule 35, sub-rule (3)—Delivery of possession under rule—Order to pull down structures in giving delivery of possession—If within the meaning of the rule—"In any other manner," if includes demolition of structures.*

*Original Side—Calcutta High Court Rules—Chapter 17 rule 13—Application under order XXI rule 35—Detail to be stated in the application.*

The provisions in Order 21 rule 35 does not in terms give the court any power to direct demolition of structures. It makes no difference whether the structures are 'kutcha' or pucca.' The position in law is that under section 108(h) of the Transfer of Property Act a lessee after determination of lease and whilst in possession may elect to take away things attached to earth before possession is taken; but he has also the option of leaving it behind in which case it becomes part of the land upon which it is attached It is then for the person who becomes the owner to deal with it as he pleases. There might be some practice prevailing in the mofussil of demolishing 'kutcha' huts when giving possession to auction purchaser but no general proposition can be laid down that rules 35 or 95 of Order 21 contain provision for demolition of structures. The words 'in any other manner' in sub rule (3) of rule 35 of Order 21 does not include demolition of structures.

*Government of Bengal* v. *Alimaddin* (1) commented upon and distinguished

*Maharaja Bir Bikram Kishore Manikya Bahadur* v. *Raj Kumar Pal* (2) and *Radha Gobind Shaha* v. *Brijendra Coomar Roy Choudhry* (3) followed.

*Hem Chandra Dutta* v. *Haran Chandra Mete* (4) dissented from.

Under the Original Side Rules in Chapter 17 rule 13 it is necessary to state the details therein in application made under Order 21 rule 35 of the Civil Procedure Code and a tabular statement in conformity with the said

* Application under Order 21, rule 35 C.P.C in the matter of Suit No. 1483 of 1936.

(1) (1952) 57 C.L J. 41.
(2) (1934) 38 C.W.N. 1951.
(3) (1872) 18 W.R. 527.
(4) (1949) 54 C.W.N. 164.

CIVIL.

1951.

Peary Churn Law v. Monmotha Nath Bancrjee.

Rule and with order 21 rule 11 and until compliance thereof direction was passed not to draw up the order.

Application by the Plaintiff Decreeholder under order 21, rule 35 C.P.C.

The material facts will appear from the judgment.

*Dr. S. Das* for the Applicant.

The judgment of the court was as follows:—

*June, 11.*

**D. N. Sinha, J.:**—This is an application under the provisions of Order 21 rule 35 of the Code of Civil Procedure for an order that the Sheriff of Calcutta do put the applicant in quiet, vacant and peaceful possession of premises No. 81A, 81B, 81C and 81D, Bechu Chatterjee Street, Calcutta, by demolishing and removing the structures standing thereon. The facts are briefly as follows: By a lease dated 1st October 1932, Pyari Churn Law and Annada Churn Law let out a piece of vacant land, then numbered 81 and subsequently renumbered 81A, 81B, 81C & 81D. Bechu Chatterjee Street, to the defendants for a term of 9 years. The lease provided that the defendants would be at liberty to erect structures such as sheds godowns, quarters etc. The lease further provided, that upon expiration or sooner determination of the lease, the lessees should put the lessors in vacant possession of the premises. The defendants built structures on the land. It is not said that the structures are kutcha huts. The lessees committed breaches of covenant by non-payment of rates and taxes whereupon the lessors exercised their right of forfeiture and instituted this suit for recovery of possession. On the 23rd January 1939, a decree was passed against the defendants for vacant possession of the land, for arrears of rent etc. On the 30th April 1946, the decreeholders made an application for possession and an order was made by consent on the 22nd April 1948, directing the Sheriff to put the applicants in vacant possession of the premises in the mode prescribed by Order XXI Rule 35(1) and if necessary under sub-rule (3) of the said order. The delivery of possession was, however, stayed till the end of the November 1948.

CIVIL.

1951.

Peary Churn Law v. Monmotha Nath Banerjee.

*Sinha, J.*

Thereafter in March 1949, the defendants Guru Charan Ram Shaw and Badriram Shaw made an application for relief under the Thica Tenancy Act and on the 5th May 1950 an order was made by consent whereby the said defendants undertook to vacate the premises by the 15th November 1950 and to put the decreeholders in peaceful and vacant possession, by removing the structures.

The defendants have subsequently removed some structures but there are still some other structures remaining. The question arises as to whether the decreeholders are entitled to an order as asked for. To start with, I think that the application itself is defective as it does not comply with our rules (Chapter 17 Rule 13). According to that rule every application under Order 21 rule 35 shall state whether the property was in the possession or occupancy of the judgment-debtor or any other person bound by the decree to vacate the property or whether it was in the occupancy of a tenant or any other person entitled to occupy the same and not bound by the decree to relinquish such occupancy. The present application is by Master's summons supported by an affidavit which merely states that the Sheriff's officer called at the premises and asked the defendants and 'other occupants of the said premises' to vacate the premises and demolish and remove the structures. I do not know whether the 'other occupants' are persons bound by the decree or not. Quite apart from this difficulty, have I the power to order demolitions of the structures? This application has been made under Order 21 rule 35 which does not in terms give the Court any power to direct demolition of structures. This matter was directly considered in *Radha Gobind Shaha* v. *Brijendra Coomar Roy Chowdhury* (1). In that case, the decree was for possession of land and the question arose as to whether a structure should be removed. The executing court refused to direct such removal upon the ground that there was no order in the decree which provided for it and such an order was not within the scope of the executing court. It was held that if in executing a decree for khas possession it was necessary to remove any of the defendants from the land covered by the decree, the court on application was authorised under Act VIII of 1859 Section 223 (now Order 21 rule 35) to remove such person. But it was not within the province of the court which

(1) (1872) 18 W.R 527.

CIVIL.

1951.

Peary Churn Law v. Monmotha Nath Banerjee.

*Sinha, J.*

executes the decree to direct that the building be pulled down.

The next case dealing with the matter is *Government of Bengal* v. *Alimddin* (1). That was really a criminal action but the point arose incidentally. In execution of a decree, land was sold. There were certain kutcha huts on the land. The Nazir was ordered to give possession to the auction purchaser under Order 21 rule 95. He asked the judgment-debtor to remove the huts but he refused and said that any removal should be done by the Nazir's men. Thereupon the Nazir with the help of his men started demolishing the huts, when the judgment-debtor with a large party assaulted them and chased them out of the land. The accused took the plea of having acted in private defence. The Sub-Divisional Officer acquitted the accused but the appeal court (consisting of Rankin, C.J. and Pearson, J.) set aside the order of acquittal upon a reference by the District and Sessions Judge. Rankin, C.J. said as follows:—"They (meaning the accused) objected apparently on the ground that the writ was only to give delivery of possession of the land and was not to give delivery of possession of the huts. There was however nothing in this objection and it was necessary to remove the huts in order to give delivery of possession of the land."

The matter again came up to be considered in *Maharaja Bir Bikram Kishore Manikya Bahadur* v. *Raj Kumar Pal* (2). It was really a case under Order 21 rule 95. In that case there were some pucca structures and it was held that the court should not order any demolition. The learned judges stated as follows:—

> "If the judgment-debtor or any of such persons (namely his representatives or persons claiming under a title created subsequent to attachment) refuses to vacate, he has to be removed because otherwise the delivery falls short of the test. Order 21 rule 35 sub-sections (1) and (3) relate to the same kind of possession, namely, actual or khas possession which the holder of a decree is entitled to, as a purchaser is entitled to get under Order 21 rule 95. Sub-rule (1) of rule 35 is worded similarly as rule 95 and sub-rule (3) of rule 35 lays down a special procedure in respect of a build-

(1) (1932) 57 C.L.J. 41. (2) (1934) 38 C.W.N. 1051.

ing or enclosure. But nowhere is it said in the law that the demolition of a pucca structure which is on the land covered by a decree or by a purchase made in execution of a decree is necessary in order to make the possession delivered effective and complete as actual or khas possession. The prayer for demolition of the structures, therefore, has been rightly refused."

Reference was also made to an unreported judgment in M.A. No. 475 of 1926 which observed as follows:

"If there is any structure of the defendants judgment-debtors the plaintiffs, in taking khas possession of the lands, would get khas possession of the structures also, if not previously removed by the judgment-debtors and then the plaintiffs may remove them or keep them as they choose."

As regards the decision in *Government of Bengal* v. *Alimaddin* (1), it was held that the point was not really decided there after contention. The matter was quite recently considered by Das Gupta. J. in *Hem Chandra Dutta* v. *Haran Chandra Mete* (2). That was also an application under Order 21 rule 95. The learned Judge relied on the decision in *Government of Bengal* v. *Alimaddin* (1), and held that the auction purchaser was entitled to demolition of the kutcha huts. The decision in *Maharaja Bir Bikram Kishore Manikya Bahadur* v. *Raj Kumar Pal* (3) was distinguished on the ground that it related to pucca structures.

So far as this case is concerned, the structures are not stated to be kutcha huts and the decisions in *Radha Gobind Shaha* v. *Brijendra Coomar Roy* (4) and *Maharaja Bir Bikram Kishore Manikya Bahadur* v. *Raj Kumar Pal* (3) are directly applicable. With great respect, however. I do not see what difference it makes whether the structures are kutcha or pucca. In my opinion. the position is as follows. Under section 108(h) of the Transfer of Property Act, a lessee may even after the determination of the lease, remove at any time whilst he is possession of the property

(1) (1932) 57 C.L.J. 41.
(2) (1949) 54 C.W.N. 164.
(3) (1934) 38 C.W.N. 1051.
(4) (1872) 18 W.R. 527.

CIVIL.

1951.

Peary Churn Law v. Monmotha Nath Banerjee.

*Sinha, J.*

leased but not afterwards all things which he has attached to the earth provided he leaves the property in the state in which he received it. A kutcha hut is as much a thing "attached to the earth" as a pucca structure and the lessee may remove it before giving up possession. When 'khas' possession is to be delivered under Order 21 rule 35 the judgment debtor and all persons bound by the decree are to be removed from the land. The hut or pucca structures must necessarily occupy a portion of the land and therefore removal of these persons from the land means removal from the hut or structure. If there are persons not bound by the decree either on the land or structure, such persons cannot be removed. Possession being so delivered, what follows? The judgment debtor might break the hut or structures and take the same away before possession is taken. For that purpose, the court always grants a sufficient time. But he has also the option of leaving it behind, in which case it becomes a part of the land upon which it is attached. It is then for the person who becomes its owner to deal with it as he pleases. The Sheriff's office cannot act as demolition squads. It has neither the staff nor the necessary equipment. Once, admit the idea of the Sheriff being liable to break structures, then logically there is no limit to what he might be called upon to do. There may be structures ranging from mud kottahs to large buildings which he may be called upon to demolish. That, in my opinion, was never contemplated by Order 21 rule 35 of the Code.

The decision reported in *Government of Bengal* v. *Alimaddin* (1) to which Rankin, C.J was a party, is distinguishable. The point to be decided there was as to whether the accused had a right of private defence. It appears from the facts of that case that the Nazir went to the land and called upon the judgment debtor to remove the huts which he refused to do. The tenant thus failed to avail himself of the opportunity granted under section 108(h) of the T P. Act to remove the things 'attached to the earth.' Upon his election not to remove the same he could no longer exercise the right of private defence in respect of something he had elected to abandon, or in respect of which his ownership stood terminated. In course of his judgment, Rankin, C.J. did say as follows: " . . . . . and it was

(1) (1932) 57 C.L.J. 41.

necessary to remove the huts in order to give delivery of possession of the land" but he might have said so for a variety of reasons which do not appear clearly in his judgment. He might have said this from the point of view that the auction purchaser had purchased only the land, or from the point of view of some practice which might prevail in the mofussil of demolishing kutcha huts when giving possession under Order 21, rule 95 to auction purchasers. I cannot think that so distinguished a judge intended to lay down a general proposition that Order 21 rule 95 or Order 21 rule 35 contains any provision for demolition of structures by the court. In any event, the point was not argued before the learned judge from this point of view and the decision is not binding upon me, particularly in view of the later decision reported in *Maharaja Bir Bikram Kishore Manikya Bahadur* v. *Raj Kumar Pal* (1). A point has also been made that the land was an 'Enclosure' as referred to in Order 21 rule 35 (3). Even so, I am of the opinion that the words 'In any other manner' does not include the demolition of structures.

I therefore hold that the decreeholder is not entitled to call upon the court to deliver possession by demolition of the structures. Possession will be given by the Sheriff by removing the Judgment debtors and all persons bound by the decree from the land.

In my opinion there should have been a tabular statement for this application. The order will not be drawn up until a tabular statement is filed, in accordance with Order 21 rule 11 and Chapter 17 rule 13 of our Rules.

The petitioner is entitled to cost of this application. Certified for counsel which he will add to his claim.

*Mr. N. C Mandal*: Solicitor for the Applicant.

S.D.G. *Application allowed.*

(1) (1934) 38 C.W.N 1051.

ORIGINAL CIVIL.

*Before Mr. Justice R. S. Bachawat.*

CIVIL.

1951.

*February, 28.*

PANNALAL SAGOREMULL

*v.*

FATEH CHAND MURALIDHAR.*

*Indian Arbitration Act (X of 1940)—Application to set aside an award—Arbitrator has jurisdiction, if he is satisfied about prima facie existence of contract—Court may inquire into the existence of contract and decide arbitrator's jurisdiction—Section 43, Indian Arbitration Act—Power of arbitrators to move High Court to subpoena witness, discretionary.*

In an application to set aside an award made by the Bengal Chamber of Commerce, the award was impeached on the ground that the arbitrators took evidence on the merits as also on the question whether the contract, which was denied by the applicant, had been entered into between the parties.

*Held*: (i) The contract in question was good and valid.

(ii) The arbitrator need not proceed upon the assumption that there is a valid and binding contract. His jurisdiction depends upon the existence of the contract. It is proper for him to inquire into this fact in order to satisfy himself that *prima facie* he has jurisdiction.

(iii) The parties can always come to the Court which alone can determine if there was, in fact, a contract which conferred jurisdiction upon the arbitrator.

(iv) If the arbitrators honestly believed that there was no necessity to move the High Court under section 43 of the Arbitration Act they were not guilty of misconduct.

Application by Pannalal Sagermull to set aside the award made by the Bengal Chamber of Commerce dated May 24, 1950.

The material facts will appear from the judgment.

*Mr. A. K. Sen* with *Mr. A. C. Bhabra*, for the Applicant.

*Mr. B. Das* with *Mr. T. K. Ghosh*, for the Respondent.

The judgment of the Court was as follows:—

* Matter No. 205 of 1950. Application to set aside an award made by the Bengal Chamber of Commerce.

CIVIL.

1951.

Pannalal Sagoremull v. Fateh Chand Muralidhar.

*February, 28.*

**R. S. Bachawat, J.:**—This is an application for setting aside an award of the Bengal Chamber of Commerce and for a declaration that the award is a nullity. This application as also the judgment on award matter have been heard simultaneously.

On February 8, 1946, by contract No. 3641 the respondent Fateh Chand Murlidhar sold 12 lacs yards of hessian cloth to S. Devi Dutta & Co. delivery March to June 1946.

On February 8, 1946 by contract No. 3637 the respondent also sold 6 lac yards of hessian cloth to S. Devi Dutta & Co. delivery April to June 1946.

By contract No. 3637 dated February 8, 1946 S. Devi Dutt & Co sold 6 lacs yards of hessian cloth to the petitioner. By contract No. 3662 dated March 22, 1946 the petitioner sold back these goods to S. Devi Dutta & Co. The two contracts were set off against each other and difference in price became payable by S. Devi Dutta & Co. to the petitioner.

The respondent duly delivered to S. Devi Dutt & Co. the March portion of the contract No. 3641 on March 25, 1946, and the April portion of that contract on April 24, 1946.

To implement its contract of sale No. 3637 to S. Devi Dutt & Co. the respondent entered into contract No. 155 dated April 25, 1946 and contract No. 158 dated April 27, 1946 with the petitioner through broker Sohanlal Hirawat. By contract No. 155 the respondent bought 2 lacs yards of hessian, and by contract No. 158 the respondent bought 4 lacs yards of hessian from the petitioner. Both contracts contain the usual arbitration clause for reference of the disputes to the Bengal Chamber of Commerce.

[His Lordship then discussed the evidence.]

On a review of the entire evidence I am clearly of the opinion that the petitioner has failed to substantiate its case and that contract Nos. 155 and 158 are genuine contracts.

Mr. Bhabra next contended that the arbitrators were guilty of misconduct because they did not call for the witnesses men-

CIVIL.

1951.

Pannalal Sagoremull v. Fateh Chand Muralidhar.

*Bachawat, J.*

tioned in the letter dated May, 5, 1950. Strictly, this allegation is untrue. The arbitrator did call for the witnesses. They wrote several letters to those witnesses. Four of the witnesses replied stating that they knew nothing of the matter and declined to be present. Mr. Bhabra stated that the real charge was that the arbitrator should have moved this court for the purpose of issuing a subpoena upon the witnesses. This charge is not made in the petition. Rule 21 of the Rules of Tribunal of Arbitration of the Bengal Chamber of Commerce confers upon the arbitrators a discretion to apply to the Civil Court for the issue of a process upon any witness if they are of the opinion that it is desirable to examine the witness.

It was for the arbitrators to decide whether they should apply to the court for the issue of the process. If they honestly believed that it was not desirable for them to make such application the court will not interfere. The matter was entirely in the discretion of the arbitrators. The court will not review their discretion if they acted honestly and if there has been no miscarriage of justice. See *Russell on Arbitration*, 14th Edition pp. 149, 271. There is no question of any *mala fides* on the part of the arbitrators. The arbitrators themselves could not issue a process and only the court could do so under section 43 of the Indian Arbitration Act. The arbitrators did their best to get all the witnesses, but none of them appeared. It was open to the petitioner to come to the court and ask for the issue of the process but he did not do so. The arbitrators were not asked to grant an adjournment nor was any complaint made to the arbitrators of any breach of duty on their part. The parties expressly stated to the arbitrators that they had no further evidence to adduce. The arbitrators acted fairly and honestly.

The award is impeached on a further ground. The arbitrators took evidence on the merits as also on the question whether contract No. 155 had been entered into between the parties. The petitioner denied that there was any contract and appeared under protest. The award recites that the arbitrators took oral evidence and were deciding the matter on the merits and it directs the petitioner to pay Rs. 7,000/- to the respondent. Counsel for the petitioner contends that the arbitrators were guilty of misconduct in taking such evidence and

that the award was without jurisdiction because the arbitrators must have decided that contract No. 155 was a valid and genuine contract. Their authority to arbitrate was the arbitration agreement which was contained in contract No. 155 and they could not decide on a question of their own jurisdiction.

It is always open to a party to deny the contract. By such denial, however, he cannot defeat the arbitration agreement nor can he take away the jurisdiction of the arbitrator to decide the dispute on the merits. Notwithstanding the denial, the arbitration may proceed on the merits. It is not suggested that the arbitration can proceed only if both parties agree as to the existence of the arbitration agreement. The contention is that such dispute must first be resolved by the court. There is neither authority nor principle in support of such contention. In *Bajrang Lal Laduram* v. *Agarwal Bros.* (1) this court has held that a party affirming the contract cannot obtain a declaration under section 33 of the Indian Arbitration Act that such contract exists. I will assume however that the court can in appropriate proceedings adjudicate on the dispute before the award is made. What is to happen if the validity of the adjudication itself is challenged later on by the party denying the contract? What is to happen if such adjudication is appealed from? Are the arbitrators to wait unless the fresh dispute is again resolved by the court? The suggestion can be made only to be rejected summarily.

If the party denying the contract instituted legal proceedings for a declaration that there was no contract, the matter has to be looked from a somewhat different standpoint. Even then it was clearly the law before the Indian Arbitration Act 1940 that notwithstanding the pendency of such proceedings the arbitration could proceed on the merits on the assumption that there was a binding contract: *Jai Narain* v. *Narain Das* (2). The matter has now to be decided having regard to the language of section 35 of the Indian Arbitration Act. This point does not arise for decision in this case as there was no legal proceedings pending at the time when the reference proceeded.

(1) ]1950[ A.I.R. Cal. 267.
(2) (1922) I.L.R. 3 Lah. 296.

CIVIL.

1951.

Pannalal Sagoremull v. Fateh Chand Muralidhar.

*Bachawat, J.*

The arbitrator need not proceed upon the assumption that there is a valid and binding contract. The jurisdiction of the arbitrator depends upon the existence of the contract. The arbitrator has power to enquire into this collateral fact. If there is no contract, he may decline to exercise his jurisdiction. It is proper for him to make the enquiry in order to satisfy himself that *prima facie* he has jurisdiction.

The decision of the arbitrator on the collateral fact is not binding upon the parties. The arbitrators cannot by a wrong decision with regard to the collateral fact give himself jurisdiction which he did not possess. The parties can always come to the court which alone can determine if there was, in fact, a contract which conferred jurisdiction upon the arbitrator. If there is no contract at all, there is nothing to arbitrate and the award is a nullity. *Ex nihilo nihil fit.*

But the award is not bad because the arbitrator enquires into factum of the existence of the contract. There is no misconduct. If the award is only on the merits, it is within the jurisdiction of the arbitrator. Even if the arbitrator takes evidence on matters which are not within his jurisdiction the award is not bad unless it is shown that the arbitrator in fact exceeded the jurisdiction. It may be necessary for the arbitrator to take evidence in order to ascertain whether the matter is within his jurisdiction. Per Lord Davey in *Falkingham* v. *Victorian Railway Commissioner* (1).

Suppose an inferior court enquires into a collateral fact upon the existence of which its jurisdiction depends, the decision is not bad because such enquiry is made. *Rex* v. *City of London, etc., Rent Tribunal* (2), shows that it is proper for the inferior tribunal to make the enquiry and the decision of the tribunal will be quashed on *certiorari* only if it is shown that the collateral fact did not exist.

In the instant case the arbitrator took evidence on the question of the factum of the contract. But the award was on the merits only. The award did not purport to decide any

(1) [1900] A.C. 452 (468-4).
(2) [1951] 1 All. E.R. 196.

collateral fact upon which the jurisdiction of the arbitrator depended. It is not shown that the arbitrator had no jurisdiction. I have held that there was a good and valid contract between the parties. The award is, therefore, good.

The petitioner challenged the award also on the ground that the arbitrators have awarded black market rates and that the award is against public policy. The matter is, however, concluded by the judgment of the Appeal Court in *Tolaram Nathmul* v. *Bilasrai & Co.* (1). I have discussed the point in detail in *Bijoy Singh Karnwat* v. *Bilasrai & Co.* (2). I adhere to the view which I have expressed in that judgment. No argument was addressed before me on this point. Mr. Bhabra has however reserved his right to argue this point before higher tribunal.

I, therefore, dismiss the application with costs and I pass judgment according to the award. Interest on decree and costs.

At the end of the judgment Mr. Bhabra asked me orally to allow him to amend the notice of motion by striking out prayer (b) which was for a declaration that the award was a nullity. Mr. Das does not object and I therefore give leave to the petitioner to amend the notice of motion by striking out prayer (b).

*Messrs. G. C. Chunder & Co.*: Solicitors for the Applicant.

*Mr. P. D. Himmatsingka*: Solicitor for Respondent.

S.K.R.C. *Application dismissed with costs.*

(1) Appeal from Original Order and Decree No. 180 and 181 of 1949.
(2) Arbitration Case No. 189 of 1950.

## ORIGINAL CIVIL.

*Before Mr. Justice D. N. Sinha.*

CIVIL.

1951.

*May, 23.*

## BELA DEBI
*v.*
## BON BEHARI ROY AND OTHERS.*

*Civil Procedure Code (Act V. of 1908)—Section 152—Construction—Accidental slips or omissions of parties—If Court can correct—Misdescription of property in an agreement for sale upon which decree for specific performance obtained—If can be corrected—Delay, if any bar—Circumstances to be considered.*

*Mistake in describing a property in an agreement for sale—Occurring anterior to suit—Corrections—Specific Relief Act (I of 1877), Section 31.*

Section 152 of the Code of Civil Procedure should not be narrowly construed It is not restricted to cases of accidental slip or omission of the Court itself or its ministerial officers; it gives power to rectify any accidental slip or omission in a judgment, decree or order and might include an accidental slip or omission traceable to the conduct of the parties themselves.

Case laws discussed:

Mistakes taking place anterior to suit and raising controversial points requiring a decision as to what was the intention of the parties cannot be done under section 152 of the Code of Civil Procedure but may be under section 31 of the Specific Relief Act

Although delay is no ground for refusing to correct an error under section 152 of the Civil Procedure Code, it should not be allowed where it will be inequitous and unjust or where third parties had acquired rights due to lapse of time.

Application by the Plaintiff.

Plaintiff applied for an order that the Schedule in the plaint in the Suit, and the consent decree dated 5-6-39 and also the Agreement dated 1-12-33 be corrected and or amended by inserting the correct schedule. There was also another prayer.

The material facts will appear from the judgment.

*Mr. M. Hazra* for the Applicant.

* Application in the matter of Suit No. 1001 of 1938.

*Mr. Sridhar Chatterjee* for the Respondent.

CIVIL

1951.

Bela Debi
v.
Bon Behari Roy

*May, 23.*

The judgment of the Court was as follows:—

**D. N. Sinha, J.:**—This is an application for an order that the schedule to the plaint in the suit, and the consent decree dated June 5, 1939, and also of the Agreement dated December 1, 1933, be corrected and/or amended by inserting the correct schedule as mentioned in paragraph 20 of the petition. There is also a prayer that the Registrar be directed to appoint a surveyor to survey the premises No. 69/1, Cossipore Road, Calcutta, after amendment and that he should be further directed to execute the Conveyance in accordance with the correct schedule.

The facts are briefly as follows:—

The defendant Bon Behari Roy is the owner of certain plots of land situated on the Cossipore Road. On or about December 1, 1933, Roy executed an Agreement for Sale in favour of one Chandrika Prasad Gupta, in respect of one of the plots of land which had been described in the agreement for sale in the following manner:

> "All that piece and parcel of land (which is at present covered with water) measuring about 10 cottahs of land (be it a little more or less) bearing Municipal No. 69/1, Cossipore Road (Baranagore) in the suburbs of Calcutta, Holding No. 84. Division I Sub-Division II butted and bounded by on the north, by Sristhidhar Lane on the south by Girindranath Mukherjee Road, on the west by Mussamat Birajini's land and Radheba Tauchha Bibi's land, paying Government revenue Rs. 2/4/11 per year in respect of the whole premises Holding No. 84."

On or about August 6, 1937, Chandrika Prasad Gupta assigned his right title and interest in the said agreement to Musammat Bela Debi since deceased, who was the plaintiff in the suit. On or about May 18, 1938, Bela Debi filed this suit against Bon Behari Roy and Chandrika Prasad, for specific performance of the Agreement for sale. It appears that two ladies, Sm. Nivanani Roy and Sm. Soilabala Mitra, claimed charges for

CIVIL.

1951.

Bela Debi
v.
Bon Behari Roy

*Sinha, J.*

maintenance on the property and on or about May 17, 1939 they were added as parties to the suit, on the application of Bon Behari Roy.

On or about June 5, 1939, a consent decree was passed in the suit. The provisions of the consent decree are briefly as follows:—

There was to be a decree for specific performance in favour of the plaintiff. Bon Behari Roy was to sell to the plaintiff or her nominee, premises No. 69/1, Cossipore Road, free from all incumbrances, at Rs. 325/- per cotta. The defendants Sm. Nivanani Roy and Sm. Sailabala Mitra relinquished their claims or charges which they might have had in respect of the property in suit. The land was to be surveyed by the defendant's surveyor in the presence of the engineer of the plaintiff, within a week from the date of the decree: And if any party failed to execute the conveyance the Registrar would do it on his behalf.

In July 1948 Bela Debi died. On March 8, 1949, there appears to have been an order for substituting Radha Krishna Shaw, her son. in her place, with leave granted to proceed with the execution.

It will therefore be observed that although the decree for specific performance was made as far back as 1939, the plaintiff in the suit had not followed it up by paying the money and getting a conveyance for a period of nearly ten years. In the meantime, land at Cossipore had tremendously appreciated in value, and this, to my mind, is the real genesis of the dispute between the parties which has resulted in this application. In May 1947, there was some correspondence between the parties and Roy wanted Rs. 3,500/- per cotta instead of Rs. 325/- per cotta as contained in the terms of settlement.

On or about June 29, 1949. Chandrika Prasad Gupta filed a suit being suit No. 2283 of 1949, against the petitioners and the other parties to this suit, for a declaration that it was he who was entitled to the benefits of the Agreement for Sale dated December 1, 1933, and also of the consent decree dated June 5, 1939. Bon Behari Roy did not appear in that suit. In that

suit, Radha Krishna Shaw was restrained from getting a conveyance of the property. On or about June, 1950, the suit was dismissed by Sarkar J. There was an application for restoration of the suit, which was ordered to be restored upon payment of certain moneys, but as the same was not paid the order of dismissal stands. The next thing that happened was that Bon Behari Roy filed a suit before the Subordinate Judge at Alipore, being Title Suit No. 115 of 1950, against Chandrika Prasad Gupta, the Shaws and the two ladies Sm. Nivanani Roy and Sm. Sailabala Mitra, for a declaration that the consent decree dated June 5, 1939, was void, nullity, and without jurisdiction. The ground made in the plaint is that the property being outside jurisdiction, the High Court could not pass such a decree. This suit has been transferred to this Court under Clause 13 of the Letters Patent.

The petitioners say that they have now made inquiries and searches in the records of the Corporation of Calcutta and the Collectorate, and also referred to Smart's Survey Plan, and have come to the conclusion that the schedule in the Agreement for Sale was not correct, but due to "Inadvertance and/or mistake, errors and omissions" the description as given in the schedule to the Agreement was not a correct description. It is said that the boundaries are quite correct but the Holding number of the premises instead of being '84' should be '85, 85/A and a portion of 86'. The next mistake is in respect of the amount of revenue payable, which is stated to be Rs. 2/4/11 per cotta but should be "Rs. 2-12-9 in respect of Holding Nos. 85 and 85A" and as "Rs. 0/3/4 in respect of Holding No. 86." Although no other mistakes are pointed out in the petition, it appeared at the hearing of the application that if the Holding is altered, then as a result the area of the land would no longer be 10 cottas, but 19 cottas more or less. In the Title-Suit filed at Alipore mentioned above, Roy has stated that the boundary given in the Agreement for Sale was wrong. According to him, the rest of the description of the properties, namely, the Holding number, the amount of revenue payable etc., are all right but the boundaries are quite incorrect.

I have looked into Smart's Survey Plan relating to these properties and I find as follows:

CIVIL.

1951.

Bela Debi
v.
Bon Behari Roy

*Sinha, J.*

If the property sold is Holding No. '85, 85/A and portion of 86', then the plot of land would be a large rectangular piece, situate almost on the main Cossipore Road, and the area would not be 10 cottahs but nearly double that area. If it is Holding No. '84', then it is a smaller plot of land, nearly square in size and situated somewhat away from the main Cossipore Road. Both these plots are stated to be covered with water. They are also referred to as 'Ponds.'

It, therefore, comes to this, that the area and amount of the revenue would be correct if the Holding is No. '84', but the boundary would be incorrect. Whereas, if it was Holding Nos. '85, 85/A and part of 86' then the boundaries would be more or less correct but the area and the revenue payable would be incorrect. As regards the boundary, it is not possible to verify it with absolute precision. It appears that in or about 1930, a portion of the land contiguous to holdings 85, 85/A was sold to Mussamat Birajini, and in the schedule to the Agreement, part of the western boundary is given as "Mussamat Birajini's land." From the materials placed before me, I am unable to verify where "Sristhidhar Lane', or 'Girindranath Mukherji Road' are situated, nor does it appear from Smart Survey Plan that these are the northern or southern boundaries of Holding Nos. '85, 85/A and part of 86'. According to Roy, the property which is now being claimed is premises No. 1/A, Satchasipara Road, which was never agreed to be sold. I am told that both these plots are ponds, and Roy states that he should not be made to convey a pond double the size of what he agreed to sell. But these are not the only difficulties. According to Roy, he had agreed to sell Holding No. 84 free from incumbrances and had got the two ladies Sm. Nivanani Roy and Sm. Sailabala Mitra (being his sister and aunt respectively) to relinquish their charges on that Holding only. According to Roy, the Holdings now claimed were heavily mortgaged and, in fact, have been now sold to third parties. Also, according to him, the two ladies above-named have no intention of releasing 'premises No. 1 Satchasipara Road' as it now is, from their claims for maintenance etc.

This application has been made under the provisions of section 152 of the Code of Civil Procedure, and the following points arise for decision:—

(1) Is it a kind of error or omission that can be rectified under section 152?

(2) In an application under section 152, is it possible to correct errors not only in the decree, but also in a deed?

(3) Is the application barred by the doctrine of laches?

The facts enumerated above will show that if there has been any error or mistake, it originated with the Agreement for Sale which was executed as long ago as 1933. Since that date, the contiguous lands have developed, the Municipal numbers have changed and to my mind (upon the materials before me) it is not possible to state with certainty as to what the parties intended without going into further evidence. If you take the boundaries, then there is reason for saying that the Holding Number is incorrect. But in that event, the discrepancy in the area is tremendous. If it was intended to sell Holding No. '84', then by altering it to Holding Nos. '85, 85/A and part of 86', I would be giving the plaintiffs a plot nearly double the area agreed to be sold, and a much more valuable plot, regard being had to its proximity to the Cossipore Road. In my opinion, this kind of dispute cannot be resolved by an application under section 152.

Next arises the question as to whether by an application of this description, I can also rectify the Agreement for sale. In *Y. S. Rao* v. *Kandukuri* (1), a decree was obtained upon a mortgage. In the mortgage, the survey numbers as set out were wrong. The wrong survey numbers were copied into the plaint and into the preliminary decree. An application was made to correct the errors, and Pandalai J. held that under section 152 this was permissible. "The object of empowering the Court to correct decrees and orders" said the learned Judges, "is to correct errors, and if it can be shown that an alleged mistake falls within the class of errors dealt with by section 152, it seems to put an unnecessary hindrance upon the power to do justice which the section gives, to say that the only mistakes of which the Court can take cognizance are those made either in the plaint or in subsequent documents in Court." This case was

(1) [1951] A.I.R Mad. 260.

CIVIL.

1951.

Bela Debi
v.
Bon Behari Roy

*Sinha, J.*

followed by Patanjali Shastri, J. in *T. V. Ranga Rao* v. *Seth Bulaksonlal* (1). The learned Judge was of the opinion that there was no ground for restricting section 152 to mistakes or errors which occur for the first time in the plaint or the subsequent proceedings in Court, but extends to cases where the mistakes occur earlier, in a document evidencing the transaction itself. A subsequent Divisional Bench of the same High Court, however, consisting of Gentle, C.J. and Happel J. dissented from both these judgments. [*See T. M. R. Chettiar* v. *G. R. Chettiar* (2)]. In that case there was a mortgage and a mortgage decree had been passed. It was stated that there was a mutual mistake and the properties described in the mortgage deed by reference to the survey numbers was an error and in the place of property No. '1467', Nos. '1463 and 1466' should be substituted. Gentle C.J. pointed out that section 152 of the Code contemplated the rectification of a clerical error or arithmetical mistakes in judgments, decrees or orders and errors arising therein from any accidental slip or omission. He pointed out that the rectification asked for, would not only mean rectification of the decree but that of the mortgage deed itself. He said as follows:

> "I am unable to see how section 152 gives to a Court jurisdiction and authority to modify a document, particularly documents upon which the suit is instituted. There is remedy by way of suit, and I find nothing in the provisions of section 152 which confers upon it similar powers as are conferred by section 31 of the Specific Relief Act. In my view, section 152 is for the purpose of correcting errors directly involved in the proceedings themselves and not for correcting errors which are anterior to the proceedings, particularly in documents upon which proceedings are brought. I am unable to see that property, wrongly described in a deed, can be included in any of the mistakes which the section allows to be corrected. It is not a clerical or an arithmetical error and I cannot see that it is an accidental slip or an omission . . . . . With great respect, I am unable to subscribe to the judgments and the decisions given in the three cases, one in Rangoon High Court, *Maung Chit Hlaing* v. *N. A. R. M. Chetty* (3) and the other in this Court, (ibid) expressed by Judges sitting

(1) [1941] A.I.R. Mad. 940.
(2) [1948] A.I.R. Mad. 13.
(3) [1924] A.I.R. Rang. 104.

alone. I prefer the decision of the Division Bench in the Allahabad Case, *Shujaatmand Khan* v. *Gogind Behari* (1). In my view, the application out of which this appeal arises does not fall within section 152.

In *Shujaatmand Khan* v. *Gobind Behari* (1), the suit was for foreclosure in relation to a mortgage. The mortgage was in respect of certain shares in zemindary properties and it was stated after the decree had been passed, that the description of the mortgaged property given in the deed was not correct. The lower court allowed parole evidence to be given to show what was the intention of the parties and then directed that the plaint and the preliminary decree should be amended as prayed. This order, however, was reversed on appeal. Young J. said:—

> "It is quite clear that the order complained of cannot possibly come within section 152 Civil Procedure Code. An amendment of this character which completely alters the plaint and the decree and also the deed on which the plaint is based cannot be said to be the correction of a clerical mistake in a judgment. There was indeed no clerical mistake even on the showing of the opposite party. The earlier mortgage deeds were copied faithfully and correctly by the clerk, and that is the ground of their present complaint. Section 152, therefore, not applying, the Court below had no jurisdiction under this section to act in the way it has done."

The learned Judges further were of the opinion that it was not permissible under the circumstances, to take parole evidence.

In *Jagarnath Prasad Bhagat* v. *Jamuna Prasad Singh* (2), a certain property was misdescribed in the mortgage deed and the misdescription affected the preliminary decree, final decree and the sale certificate. The auction purchaser applied for amendment of the sale certificate by substituting the correct description. In the bond the property was described as '3 annas 4 gandas pokhta shares, out of 16 annas in Taluk Mangrar included in Khewat No. 3'. It was found, however, that no part of Taluk Mangrar was in Khewat No. 3 but it was included in Khewat No. 2. Courtney Terrell C.J. and Agarwalla J. held that there was no doubt as to the identity of the property but

(1) [1934] A I.R. All. 100.
(2) [1934] A.I.R. Pat. 493.

CIVIL.

1951.

Bela Debi
v.
Bon Behari Roy

*Sinha, J.*

it was a case only of misdescription and the sale certificate should be allowed to be amended. In a subsequent Patna case, *Ram sankar Bandopadaya* v. *Khudiram Dutt* (1) Fazl Ali J. held that where the property was sold in execution of a decree, the question whether the description of the property by the Khewat number, or its description by its area should prevail, cannot be dealt with, under section 151 or 152 of the Code.

It will thus be seen that there is a diversity of judicial opinion as to how far a court can go in rectifying its own decree. Where, of course, the amendment is in order to carry out its own meaning, there is no doubt about the power of the court in effecting such correction [see *In re. St. Nazaire Co.* (2); *Preston Banking Co.* v. *Allsup* (3)]. Nor can it be disputed that it has power to rectify mistakes which are of a ministerial kind [see *Mellor* v. *Swire* (4)]. But the difficulty arises when it is found that the mistake is not one of the court but is a mistake of the parties themselves. Mistakes in the description of properties in deeds, is illustrative of this kind of mistake. It is the parties who have made the mistake, and the mistake is continued in the pleadings and the decree. According to one view, section 152 is confined to acts of the court and, therefore, mistakes of parties made in the pleadings or deeds and documents evidencing the transaction cannot be corrected [see *L. Ram Chander Sarup* v. *Mazhar Hussain* (5)]. The second view is that under this section and section 151, plaint, judgment and decree all can be amended (see *Shiam Lal* v. *Mt. Moona Kuar* (6); *Ram Chandra Sahu* v. *Jamna Prasad* (7). A third view is that it is permissible under such circumstances to amend the decree and it is not necessary to amend the plaint [*Badri Pande* v. *Chhangur Pandey* (8); *Jamini Bala Biswas* v. *Bank of Chettino Ltd.* (9)]. Lastly, there is the view which I have already noted, which goes to the extent of holding that the court can not only rectify pleadings and decrees but rectify documents evidencing the transactions themselves upon which the suit was founded.

(1) [1942] A.I.R. Pat 328.
(2) (1879) 12 Ch. D 88.
(3) [1895] 1 Ch. 141.
(4) (1885) 30 Ch. D. 239.
(5) [1919] A.I.R. All. 264.
(6) [1934] A.I.R. Oudh. 352 (354).
(7) [1935] A.I.R. Oudh 92.
(8) [1933] A.I R. All. 102.
(9) [1935] A.I.R. Rang. 522 (523).

CIVIL.

1951.

Bela Debi
v.
Bon Behari Roy

*Sinha, J.*

I shall now state, what in my opinion, is the true meaning of section 152 of the Civil Procedure Code. I am not in favour of giving a narrow construction to section 152. I do not agree that section 152 must necessarily refer to an 'accidental slip or omission' of the court itself, or its ministerial officers. It does not say so in the section itself, and should not be interpreted as such. Where it is the court's own accidental slip or omission or that of its ministerial officers, there can be no doubt that the section applies. But it gives power to rectify any accidental slip or omission in a judgment decree or order and might include an accidental slip or omission traceable to the conduct of the parties themselves. But it must be an 'accidental slip or omission.' A mistake made by the parties in a deed upon which the suit is founded and repeated in the judgment decree or order, may or may not be an 'accidental slip or omission.' Where it is clear, that such is the case, then I do not see why the Court cannot set it right. In doing so, what is going to be rectified is the judgment, decree or order and it is not at all necessary to rectify either the pleadings or the deed. In making such corrections, however, the court can only proceed on the footing that there could be no reasonable doubt as to what it really intended to say in its judgment, decree or order. It cannot go into any disputed questions. If there is a particular description of a property in a deed, and a suit has been instituted on the strength of that description, and a decree passed, it is not permissible in proceedings under section 152 to go into disputed questions as to what property was intended to be dealt with, by the parties in the deed. I agree with Gentle C.J. that such a question can only be dealt with in appropriate proceedings under the Specific Relief Act. *Chettiar* v. *Chettiar* (1). But it may so happen that the mistake is so palpable that nobody can possibly have any doubt as to what the parties meant or what the court meant when it passed its judgment decree or order. For example, suppose in a conveyance a property is described as '24, Chowringhee Road, Bhowanipur.' It would be clear to everybody what property was meant and it cannot be seriously doubted that in stating that property was in 'Bhowanipur,' the parties had committed an accidental slip or omission.' In such a case, I would not go to the extent of holding that the court has no power to correct the judgment decree or order which

(1) [1948] A.I.R. Mad. 13.

CIVIL.

1951.

Bela Debi
v.
Bon Behari Roy

*Sinha, J.*

has repeated the mistake. In doing so, the court need not correct the pleadings or the document but its own decision. In my opinion, it is not necessary in such a case to amend the pleadings or to rectify the deed, therefore, no question arises as to whether the court has power to do so. It is, however, quite clear that such cases must be of rare occurrence and the scope thereof is severely limited. The power cannot be extended to the resolving of controversial points, and a decision as to what the parties intended or did not intend to do. Apart from this exceptional case, I hold that the court cannot correct errors anterior to the proceedings before it. For such a purpose the proper proceeding is by way of a suit under section 31 of the Specific Relief Act. To this extent I agree respectfully with the view enunciated by Gentle, C.J. in *Chettiar* v. *Chettiar* (1), and the view expressed by Young J. in *Shujaatmand Khan* v. *Govind Behari* (2). Applying these principles to the facts of this case, I think that the rectification asked for is impossible. If there has been a mistake in the original agreement it is a mistake which is fundamental, and it is impossible without going into evidence, to decide as to what the parties meant. There are facts in favour of the contention put forward by either party and I cannot describe it as an error (if there is at all any error) as can be called "an accidental slip or omission" as contemplated in section 152. In any event, such slips or omissions cannot be rectified in proceedings under section 152 or even under section 151 of the Code.

Lastly, there remains the question of delay. There is no time limit for applications under section 152. Under the corresponding English rule, an error in a decree was in one case amended after 39 years. *Hatton* v. *Harris* (3). In a Bombay case *Karim Mahomed* v. *Rajooma* (4), an application to rectify a decree was allowed after the lapse of ten years. It is, however, an equally established fact that no amendment should be allowed if third parties had acquired rights, and/or where it would be inequitable or unjust to allow the rectification. Laches, under the particular circumstances of the case, might disentitle a party to relief under this section. See *Khisori* v. *Chhanga* (5). In this case, it was contemplated by the terms of settlement that there should be a survey within a week and yet nothing was done for

(1) [1948] A.I R. Mad. 18.
(2) [1934] A.I.R. All. 100.
(3) [1892] A.C. 547.
(4) (1888) I.L.R. 12 Bom. 174 (183).
(5) (1924) I.L.R. 47 All. 44.

ten years, in the meanwhile the nature of the contiguous properties, the Municipal numbers, all had been altered; new roads seem to have come into existence, and the particular property which the petitioner now claims, has been the subject matter of sale and/or mortgage. In my opinion, there is no excuse for the laches of the petitioner in the circumstances of this case. It is alleged by the petitioners that no particulars have been given of the mortgage or sale of the disputed property. If I was in favour of the petitioners on the other points, I might have directed further particulars to be given, but inasmuch as I am against the petitioners on the main question as to whether it was a fit case for intervention under section 152 of the Code, I do not think I should be justified in prolonging the proceedings.

The application, therefore, fails and must be dismissed with costs.

Nothing that I have said herein is to prejudice either of the parties in a properly instituted action. Nor will it affect any application made to carry out the terms of the consent decree, strictly in terms thereof.

*Mr. G. N. Auddy*: Solicitor for the Applicant.

*Mr. A. N. Bose*: Solicitor for the Respondant.

S.D.G. *Application dismissed*

## FEDERAL COURT.

Present: *The Hon'ble H. J. Kania, C.J., The Hon'ble Mr. Justice S. Fazl Ali, The Hon'ble Mr. Justice M. Patanjali Sastri, The Hon'ble Mr. Justice Mehr Chand Mahajan, The Hon'ble Mr. Justice B. K. Mukherjea.*

CIVIL.

1949.

*May, 20.*

RAJLAKSHMI BISWAS

*v.*

NURSINGDAS BINNANY AND ANOTHER.**

*Consent decree—Compromise of a suit by Pardanashin lady—Implied authority of counsel and solicitor to compromise—Wife by her conduct held out the husband as the only means of communication between herself and her attorney—Risk of wrong instruction.*

The wife had by her conduct held out the husband as the only means of communication between herself and her attorney and she had thus with open eyes taken the risk present in such cases that her instructions might not be properly conveyed to the attorney.

If the husband wrongly instructed the attorney, the wife must suffer the consequences for that and the other parties are not concerned with it.

Appeal by the Defendant.

Suit for specific performance of the Sale agreement.

The relevant facts will appear from the judgment.

*Mr. I. P. Mukherjee,* Senior Advocate, Federal Court. (*Mr. Surendra Nath Mukherjee,* Advocate, Federal Court. *Mr. S. Das,* Advocate, Calcutta High Court with him) instructed by *Mr. P. K. Chatterjee,* Agent for the Appellant.

*Messrs. A. K. Das and R. S. Bachawat,* Advocate, Federal Court, instructed by *Mr. P. K. Bose,* Agent, for the Respondents.

The relevant facts will appear from the judgment.

** Civil Appeal No. XLVII of 1948 under the Federal Court (Enlargement of Jurisdiction) Act 1937, from the High Court of Judicature at Fort William in Bengal.

CIVIL.

1949.

RAJLAKSHMI BISWAS v. NURSINGDAS BINNANY

*May, 20.*

The judgment of the Court was delivered by:

**Mahajan, J.:**—This appeal has come to us under our extended jurisdiction from a decision of a Division Bench of the Calcutta High Court reversing an order of a single Judge of that Court setting aside a consent decree passed in a suit for specific performance.

The facts are that one Raj Lakshmi Biswas, a purdanashin lady and wife of Balai Chand Biswas, purchased from the Calcutta Improvement Trust for a sum of Rs. 81,000/- premises No. 15, Kali Krishna Tagore Street in the town of Calcutta in August 1944. It is alleged that she agreed to sell the said premises to one Golap Das Khetri, a nominee of Narsingdas Binnany, for a sum of Rs. 1,30.000/-. It is further alleged that on frivolous pretexts she declined to execute a sale deed in favour of the purchaser. On the 29th August, 1944, Binnany and Khetri sued for specific performance of the sale agreement. Raj Lakshmi filed a written statement on 16th January, 1945 and pleaded that she had not authorized anybody to enter into a sale contract on her behalf or to execute a concluded agreement for sale. In this suit a consent decree was passed on 28th May, 1946 and the plaintiffs' suit was decreed but the parties were left to bear their own costs. The terms of settlement were signed by Mr. S. R. Das Gupta, her counsel and by Mr. B. C. Ghose, counsel for the plaintiffs. On 2nd July, 1946 she took out a notice of motion and pleaded that the compromise was not binding on her. It was alleged that she was never consulted either by the attorney or by the counsel or by the husband as to the terms of the settlement and that she did not instruct any of them to settle the suit behind her back. Mr. Justice Latifur Rahaman held that the applicant knew nothing of the settlement and that her husband did apparently what she never instructed him to do and that she was completely in the dark. In the result it was held that the compromise effected by her husband without her knowledge and authority did not bind her. On appeal this decision was reversed and it was held that Mr. Chatterjee, the solicitor, had obtained from his client through her husband instructions to settle the case on the terms suggested by the counsel on 14th May, 1946 and that he accordingly asked the counsel to compromise the suit.

CIVIL.

1949.

Rajlakshmi Biswas v. Nursingdas Binnany

*Mahajan, J.*

In this court it was contended that there was no evidence to support the finding of the High Court that the lady expressly instructed the solicitor through her husband to compromise the matter and, that the inference drawn by the High Court from certain facts about her consent was a pure conjecture. That both the solicitor and the counsel have implied authority to compromise a case on behalf of their client was conceded. It was however argued that neither the counsel nor the solicitor acted under cover of any implied authority or at their own initiative in this case and if no express instructions are proved the compromise is not binding on the appellant. It was suggested that the rule of implied authority of counsel and solicitor should not be applied to cases of pardanashin ladies.

In our opinion, this appeal can be decided on a short point. The two courts below have differed on the appreciation of the evidence led on the question of fact, the trial Judge holding that the applicant knew nothing of the terms of the settlement and that the husband did apparently what she never instructed him to do and that she was kept completely in the dark; the appellate court on the other hand taking the view that the solicitor had been expressly instructed by the client through the husband to compromise the matter. In this situation it is necessary to scrutinize the evidence with some care and then to find whether the trial Judge or the appellate court reached a correct decision on the point in controversy in the case.

It was on the 14th May 1946 that admittedly a conference took place in the bar library, which was attended by the solicitor, Mr. Chatterjee, Balai Chand Biswas, the appellant's husband, Mr. Das Gupta and Mr. Meyer, the two counsel engaged on her behalf. When the conference took place, the specific performance suit had been appearing in the warning list of the Original Side of the High Court for a period of over three months. On the 13th May, a day previous to the conference, it was seventh on the list. The plaintiffs had briefed as their leader Mr. B. C. Ghose, one of the leading advocates practising on the Original Side. At this conference the counsel for the appellant were of the opinion that in order to prove her defence in the specific performance suit it was necessary that both her solicitor, Mr. Chatterjee and her husband Balai should give evidence on her

behalf and without that evidence her defence could not be substantiated. Both these persons in unambiguous terms expressed their unwillingness to give evidence on behalf of the defendant in the suit. When the counsel found that without the evidence of these two most important witnesses the lady's defence could not be proved, they suggested that in the circumstances there was very little chance of success in the case and it would be in her interest if the suit was compromised and the plaintiffs given a decree for specific performance on their dropping costs. On the point of the reaction of the solicitor and the appellant's husband to this suggestion there is conflict of testimony. The solicitor, whose evidence has been given in a most unsatisfactory manner and who is certainly not a witness of truth, denies having given any instructions to counsel to settle the case He deposed that when counsel said "Why not settle this matter?", "I said: I have no definite instruction for settlement. After that we did not talk." When asked "Did you tell your client, counsel was advising to settle?", the answer was "No". The appellant's husband, who was also present at the same conference, however, gives a different version. In answer to question No. 21 he said, "Mr. Das Gupta told me that if I would not come to the witness box, this case could not proceed. I told him that my wife was in favour of my proceeding with the case." When asked whether he communicated the conversation he had with Mr. Gupta to his wife, the answer was that he did so and that he conveyed the whole conversation whatever it was and that his wife was fully aware of the opinion expressed by counsel. He further deposed that his wife gave instructions to continue the suit on hearing the opinion of counsel and these instructions were correctly conveyed to the attorney. He says "She asked me to tell the attorney that if I were not willing to go to the witness box, she was ready to go to the witness box or to be examined on commission and she asked the attorney to proceed with the case." The solicitor when questioned as to what the husband's reaction was to the counsel's opinion said in reply to question No. 41 that he gave the following answer: "I am not going to go into the witness box; you fight the suit on law points." The appellant herself in her affidavit denied all knowledge of any talk on the matter of compromise either with the husband or with the solicitor. She however did not appear in the witness box or offer herself for cross-examination. The two witnesses

CIVIL.

1949.

Rajlakshmi Biswas v. Nursingdas Binnany

*Mahajan, J*

on whose evidence she relied, as would appear from their statements, gave contradictory and conflicting testimony. The two counsel, who are leading members of the Calcutta Bar, were allowed to make statements at the bar without objection. Their statements were not criticized in any manner by the learned counsel appearing for the appellant before us. Both the counsel were willing to give evidence and were prepared to submit themselves to cross-examination. On the appellant's side it was said that it was not necessary to do so. It must therefore be assumed that whatever the learned counsel said stands unchallenged and uncontradicted. Mr. Meyer stated that he was instructed to settle the case on the terms contained in the consent decree and that these instructions were given by Mr. Chatterjee, the solicitor, who told him to finish the matter on those terms and this was said in the husband's presence. Mr. Das Gupta stated that after the conference the impression left on his mind was that the client's husband had left the matter entirely to him and that after two or three days (i.e., on the 16th or 17th) the solicitor came to him and definitely told him to settle the suit on the terms already suggested and that no restriction was put on his power to settle the suit. These statements positively prove that Mr. Chatterjee when he denied that he gave any instructions to the counsel was not telling the truth and it must be held that on the 14th he left the matter at the entire discretion of the counsel and on the 16th after getting instructions from the client he asked counsel to negotiate with the other side's counsel for the settlement of the suit on the terms contained in the consent decree.

There was no direct touch between the solicitor and the client, who is a pardanashin lady, admittedly up to the stage of the consent decree and the channel of communication between the solicitor and the client was the husband. All correspondence by the solicitor was addressed to the husband and all instructions in the conduct of the suit were received from the husband. It is in the evidence of the husband, already quoted, that he informed his wife on the 14th about the opinion of the counsel and conveyed the instructions of his wife to the solicitor. The counsel's statement therefore that he received formal instructions on the 16th is fully supported by the evidence given by the husband. These instructions could be no other than

stated by the counsel, as the counsel had no interest whatsoever in acting contrary to the instructions given to them. It is therefore clear that on the 16th the attorney gave instructions to the counsel in the terms stated by the two learned counsel and these were given after he had consulted his client through her husband who was the only channel of communication between them and he had no reason to distrust him. Whether the husband actually consulted the wife or not, on that question there is conflict of testimony between the wife and the husband. The husband, when cross-examined, says that he did consult his wife and the wife in her affidavit says she was not consulted. In our opinion, it is wholly immaterial what passed between the husband and the wife. The wife had by her conduct held out the husband as the only means of communication between herself and the attorney and she had thus with open eyes taken the risk present in such cases that her instructions might not be properly conveyed to the attorney. For that she herself is to blame. If the husband wrongly instructed the attorney, she must suffer the consequences for that and the respondents are not concerned with it. In this case however it seems to us that there is no reason to disbelieve the husband's statement to the effect that he consulted his wife. The appellant put him forward as her witness and she must take the consequences of the evidence given by him. It is a part of her case, as disclosed in the evidence of her witness, that she was consulted, but that the instruction given was that the case should be fought out on the merits even without the evidence of the attorney and of the husband. This part of the statement is not believeable because it is inconsistent with the subsequent conduct of the witness, the attorney and the counsel. That conduct is only explicable on the basis that the attorney, the husband and the client were all agreeable for a settlement of the suit according to the advice of their counsel and that the counsel acted in the matter with clear instructions. This finding finds support from the subsequent conduct of the attorney also. On the 29th May, a day after the consent decree had been passed, he informed his client about its terms without in the least indicating that the counsel had acted against his instructions or against the instructions of the husband. It was not even hinted that something abnormal had happened. When the attorneys for the plaintiffs in the specific performance suit asked Mr. Chatterjee for a conveyance, in reply

CIVIL.

1949.

Rajlakshmi Biswas v. Nursingdas Binnany

*Mahajan, J.*

to this letter on 4th June he stated that he would reply after completing some enquiries he was making. No statement was made that the compromise was not binding on his client. On the 6th June 1945 Messrs. Leslie and Hinds wrote to Mr. Chatterjee expressing surprise at his letter of the 4th and mentioned in detail all the negotiations which finally led to the consent decree. Mr. Chatterjee did not give any reply to this letter till the 12th. On the 11th he wrote to the Registrar of the High Court saying that his client had given no instructions to settle the suit and that the counsel consented to a decree without instructions, and on the 12th his reply to Messrs. Leslie and Hinds was that Mr. S. R. Das Gupta or Mr. Meyer were never instructed by him to consent to Mr. B. C. Ghose to have the suit mentioned before Mr. Justice Latifur Rahaman and to have the suit put on the list for the purpose of putting in the terms, and that his client never instructed her counsel or him to settle the suit on the terms on which it was alleged it was settled. If something very abnormal had happened, one would have expected the attorney, the husband or the lady to immediately issue a notice to the counsel and to the other side about the mistake committed. In these circumstances, it seems to us that the decision of the trial Judge that the lady was absolutely kept in the dark about the compromise cannot be sustained and the view of the Division Bench that the compromise entered into by the counsel was fully authorized by the attorney but was entered into with the clear consent of the husband who had consulted his wife must be upheld.

In view of this finding it is not necessary to examine the other arguments addressed to us about the implied authority of the solicitor or the counsel.

For the reasons given above we dismiss this appeal with costs.

S.K.R.C. *Appeal dismissed with costs.*

## APPELLATE CIVIL.

*Before Sir Arthur Trevor Harries, Chief Justice, and Mr. Justice G. N. Das.*

CIVIL.

1951.

June, 29.

## DOMINION OF INDIA

*v.*

## VIRJEE DOYA & CO.*

*Indian Railways Act (IX of 1890)—Forwarding note for carriage of goods—Conditions in—Reclassification and recalculation at destination of rates terminals and other charges—Meaning of—If a part of the contract—Position of assignee from the consignor or consignee.*

Conditions on the back of a forwarding note is a part of the contract. Railway administration can claim to charge at the station of destination at a higher and correct rate under clause 6 of the forwarding note.

An assignee of the consignee or consignor is bound by the contract.

Cases referred to—

*Chunnilal* v. *Nizam's Guaranteed State Railway Co., Ltd.* (1). *Secretary of State* v. *Harbans Prasad* (2). *Sheik Dawood Rowther* v. *South Indian Railway Co., Ltd.* (3). *Firm Ramnath Ladhuram* v. *North Western Railway* (4).

Appeal by the Defendants.

Suit for recovery of certain sums of money which the plaintiffs allege to have paid to the defendants under protest.

The material facts will appear from the judgment.

*Mr. Bhabesh Narayan Bose* for the Appellant.

*Mr. Noni Coomar Chakravarty* for the Respondents.

* Appeal from Appellate Decree No. 1249 of 1948 against the decree of Sri Santosh Kumar Neogy, District Judge, Howrah in Money Appeal No. 5 of 1947 dated 30-6-1948 affirming the decree of Sri M. M. Bhattacharjee, Subordinate Judge, 1st Court, Howrah dated 19-12-1946.

(1) (1906) I.L.R. 29 All. 228 F.B.
(2) (1929) I.L.R. 52 All. 81.
(3) [1945] I.L.R. Mad. 174.
(4) [1926] A.I.R. Lah. 631.

CIVIL.

1951.

Dominion of India v. Virjee Doya & Co.

*June, 29.*

The judgment of the Court was as follows:

**C. N. Das, J.:**—This is an appeal by the Defendants in a suit for recovery of certain sums of money which the plaintiffs allege to have paid to the defendants under protest.

The plaintiffs case is that they consigned certain goods from Karachi Bundar, a station on the North Western Railway to Howrah, a station on the East Indian Railway. At the place of destination the Railway Company over charged the plaintiffs with certain freights which are not legally payable. The plaintiffs accordingly claim the sum so overpaid with interest at 12 per cent per annum. The claim was laid at Rs. 4,253-6 viz. Rs. 3,525-14-0 as the excess freight realised and Rs. 420 as interest at 12 per cent per annum and Rs. 30,700-10 on account of certain other items.

The defence of the railway administration is that there was no excess payment and that due to a mistake on the part of the booking clerk at Karachi Bunder the freight was calculated wrongly over a portion of the journey from Karachi Bunder to Ghaziabad.

Both the courts below have decreed the plaintiffs suit in part. The defendants have preferred this appeal.

The findings of the courts below are that the Railway administration charged for the goods at a lower rate over that portion of the journey from Karachi Bunder to Ghaziabad and that this was due to a mistake on the part of the booking clerk, and that the rate charged was that leviable for goods which were carried at the railway risk.

Mr. Bose appearing for the defendants has contended that the railway administration was entitled to the excess rate by virtue of condition 6 which appears on the back of the forwarding note. Clause 6 of the forwarding note is in these terms:—

"That the Railway administration has the right of re-measurement, re-weighment, re-classification, and re-calculation of rates, terminals and other charges at the place of destination and of collecting before delivery of goods any amount that may have been remitted or under charged."

The question is whether the excess freight which was levied at destination comes within this condition. The words "re-classification and re-calculation of rates" are obviously intended to cover cases where the railway administration had charged a lower rate than what was payable in respect to the carriage of the goods. It was suggested that this refers only to cases where the goods carried by the Railway administration were wrongly classified. This in my opinion cannot be accepted because the words are "re-classification and re-calculation of rates" and not of goods. It obviously covers a case where a certain rate was payable for the goods carried, but the rate charged was different from that which was properly payable according to the rules.

It also appears to me that the present case would also come within that part of the condition which relates to the realization of other charges.

It was contended that the plaintiffs being assignees of the consignee are not bound by these conditions. In my opinion the plaintiffs can have no higher rights than the consignor or the consignee had under the terms of the forwarding notes. It is undisputed that these terms bind the consignor.

It was also contended that condition 6 appearing on the back of the forwarding note is not a part of the contract. It appears that on the face of the forwarding note it is stated that the goods are carried subject to the conditions on the back of the forwarding note. The contract between the Railway administration and the consignor must be considered with reference to the terms contained in the forwarding note. It cannot be suggested that the freight which is mentioned in the forwarding note and the rate which has been charged therein form the sole term of the contract. We must regard all the terms contained in the forwarding note as forming the basis of the contract and one of the terms is that contained in condition 6. The whole question is as to the interpretation of the condition 6 appearing in the forwarding note. I have already stated my view of the effect of the forwarding note. Reference has been made to a number of cases in this Court. These cases do not speak with one voice. I shall now refer to the cases cited at the Bar.

CIVIL.

1951.

Dominion of India v. Virjee Doya & Co.

*Das, J.*

On behalf of the plaintiff respondents reliance was placed on the decision in the case of *Chunni Lal* v. *The Nizam's Guaranteed State Railway Co. Ltd.* (1). In that case certain goods were consigned from a station on the Nizam's State Railway to a station on the G. I. P. Railway. The goods were charged at the wagon rate. At the station of destination the Railway administration found that the goods had been wrongly charged at that rate and the Railway administration recovered the proper charges, namely charges at the maund rate. The question was whether the Railway administration was justified in levying freight on the goods consigned, at the maund rate. The Full Bench was of opinion that the Railway Company were not entitled to recover the excess rate and that r. 31 of the goods Tariff of the Great Indian Peninsular Railway, which is similar to condition 6 appearing in the present forwarding note did not empower the Railway Company to charge the excess. The Full Bench merely stated that this would have the effect of altering the contract between the parties. No reasons are given in the judgment of the Full Bench as to how the contract between the parties would be altered. This decision was distinguished in a later Bench decision of the same Court. *Secretary of State for India in Council* v. *Harbans Prasad* (2). In that case certain goods had been consigned from a station on the O. & R. Section of the East Indian Railway to a station on the Great Indian Peninsular Railway. The goods had to pass in course of their journey through different Railways. It appears that a lower freight was charged on O. & R. portion of the journey through mistake. The Railway administration instead of charging first class rate which was leviable charged a concession rate known as carriers rate on that portion of the journey. The mistake was discovered at destination and the Railway administration recovered the correct freight. The Bench dismissed the plaintiffs suit on the ground that the Railway administration was entitled to levy correct rate in view of condition 6 which was similar to the condition which now appears on the back of the forwarding note as condition 6, and that the case was really one of the wrong classification of the rate. The view taken by this Bench decision of the Allahabad High Court has been taken in a later Bench decision of the Madras High Court in the case of *Sheik Dawood Rowther* v.

(1) (1906) I.L.R. 29 All. 228 (F.B.)

(2) (1929) I.L.R. 52 All. 81.

*The South Indian Railway Company Ltd.* (1). Reliance was placed on behalf of the Plaintiff Respondents on a Bench decision of the Lahore High Court in the case of *Firm Ramnath Ladhu Ram v. North Western Railway* (2). In that case it was suggested that if the Railway administration is allowed to realise the excess rate that would have the effect of altering the basic terms of the contract. In my opinion the Bench over looked the fact that the contract between the parties related not merely to the rate actually charged which appeared on the face of the note, but also to the conditions subject to which the goods were carried.

Our attention was not drawn to any decision of this Court.

As I have said already, the decision of the different High Courts are somewhat divergent. In my opinion the real point is what is meant by the expression 're-classification and re-calculation of the rate.' I have already said that this expression covers cases where a wrong rate was charged through mistake and it was later discovered that the rates actually charged for the goods carried were lower than those which were properly chargeable for those goods. In other words, if certain goods are to be charged at a rate which was payable for class I goods and the rate levied at the place of acceptance of the goods is lower than that, the railway administration can very well claim to charge at the station of destination at the higher and correct rate under this clause. In any event I am of the opinion that the last part of the condition 'other charges' are sufficiently wide to cover a case like this. For these reasons I am of the opinion that the courts below were in error in holding that the administration was not entitled to recover the excess rate at destination.

It has been pointed out to us that in the course of the trial the Railway administration admitted that the rate actually charged at destination was in excess of what would have been legally payable by the consignor for a portion of the journey. This is a matter which has not been properly decided by the Courts below and this matter should be enquired into by the trial Court.

(1) [1945] I.L.R. Mad. 174.
(2) [1926] A.I.R. Lah. 631.

CIVIL.

1951.

Dominion of India v. Virjee Doya & Co.

*Das, J.*

In the result this appeal must be allowed. The judgment and decree of the Courts below are set aside. The plaintiffs claim in so far as it relates to the excess rate . . . . . which was properly charged by the Railway administration should be dismissed. An enquiry will be made in regard to the amount which was realised by the Railway administration on a miscalculation of the rate properly payable. This matter will therefore be remitted to the trial Court for ascertainment of the excess amount which was realised by the Railway administration on a wrong calculation of the rate actually and properly payable by the plaintiff in regard to the consignment and for giving the plaintiff relief, if any, only to that extent.

As the appeal mainly succeeds the appellants are entitled to the costs of this appeal. As regards the costs of the Courts below there will be a decree in favour of the defendants for proportionate costs in accordance with the decision of the trial Court as regards the amount to which the plaintiff may be ultimately entitled on calculation after remand.

**Harries, C.J.:**—I agree.

S.D.G. *Appeal allowed.*

## CIVIL REVISION.

*Before Sir Arthur Trevor Harries, Chief Justice and Mr. Justice G. N. Das.*

TULSI CHARAN DAS AND OTHERS.

*v.*

SUBAL CHANDRA DAS.*

CIVIL.

1951.

*June, 1.*

*Civil Procedure Code (Act V of 1908)—Order 21 rule 100—Symbolical possession taken by auction purchaser—Forceful physical dispossession of the tenant judgment debtor—If remedy under the above rule available.*

*Civil Procedure Code—Section 115—Revision against order passed under Order 21 rule 100—If lies when suit under rule 103 available.*

Delivery of possession under Order 21 rule 95 terminates the execution proceedings of which rule 100 is a part providing summary method of dealing with dispossession in the course of execution. The rule will not apply to cases of dispossession after the execution has terminated,

*Rajendra Kishore Pal Chaudhury* v. *Asir Ulla* (1) dissented from,

*Hare Krishna Rana* v. *Jamini Sundari Dassi* (2) approved

Remedy by a suit under Order 21 rule 103 though an alternative remedy, yet it is no bar against maintainability of an application under Section 115 of the Code of Civil Procedure. In a fit case the Court can revise the order under section 115 of the Civil Procedure Code although there is a remedy by way of suit.

Application by the tenants under Order 21 rule 100 Civil Procedure Code.

The material facts will appear from the judgment.

*Mr. Shyama Charan Mitter,* for the Petitioner.

*Mr. Arun Kumar Dutta,* for the Opposite Party.

The judgment of the Court was as follows:

* Civil Revision Case No. 47 of 1951.

(1) (1937) 65 C.L.J. 416.
(2) [1950] A.I.R. Cal. 555.

CIVIL.

1951.

Tulsi Charan Das
v.
Subal Chandra Das

*June, 1.*

**Harries, C.J.:**—This is a petition for revision of an order of a learned Munsif allowing an application made under the provisions of Order 21, rule 100 of the Code of Civil Procedure.

The opposite parties in these proceedings were the tenants of certain properties and these properties were sold at the instance of the zamindar in a rent execution case and the holdings were purchased by the zamindar himself.

Thereafter the zamindar held these lands in *khas*. The opposite parties then applied to a Debt-Settlement Board under Section 37A of the Bengal Agricultural Debtors Act and that application culminated in an award under which the opposite parties received back their properties on April 10, 1949. It was alleged that since that date the opposite parties had been in possession of the properties.

Afterwards another rent suit was instituted in respect of earlier rent and a decree was obtained and the property was put up for sale and purchased by an auction purchaser on October 26, 1949.

The court gave the auction-purchaser delivery of possession under Order 21 rule 95 of the Code of Civil Procedure on July 8, 1950.

According to the opposite parties the auction purchaser did not on July 8, 1950, receive anything more than symbolic possession. But on July 18 the auction purchaser physically dispossessed the opposite parties and took physical possession of the property.

The opposite parties who had been dispossessed applied under Order 21 rule 100 of the Code of Civil Procedure. No written objection was filed. But it is quite clear from the case for the opposite parties and from the judgment of the learned Munsif that the allegation was that the opposite parties were dispossessed some ten days after delivery of possession had been given to the auction purchaser by the Court under Order 21 rule 95.

It was contended on behalf of the auction purchaser that as the execution proceedings had terminated by delivery of possession by the Court on July 18, no application under Order 21 rule 100 would lie in respect of dispossession at some later date. The learned Munsiff however held that the dispossession complained of need not be a dispossession in the execution proceedings and may be subsequent to it.

Accordingly the learned Munsiff made an order in favour of the opposite parties.

The auction purchaser has preferred this petition and a preliminary objection has been taken that no revision lies. It has been pointed out that the auction purchaser if he was dissatisfied with the decision of the Munsiff, could have instituted a suit under Order 21 rule 103 and as that remedy was available to him the Court cannot entertain this application in revision.

There is nothing in the actual terms of section 115 of the Code which would prevent the Court hearing this application. Where the order sought to be revised is appealable then no revision lies. But this order was not appealable although it could be challenged by way of a suit. There is therefore nothing in the plain terms of Section 115 of the Code of Civil Procedure which would bar this right of revision.

This Court and other Courts constantly hear petitions for revision of orders made under Order 21 rule 58 of the Code of Civil Procedure though decisions upon applications under Order 21 rule 58 can be challenged by a suit under Order 21 rule 63 within twelve months. If this Court has jurisdiction to hear revisions from decisions under Order 21 rule 58, it clearly has the same jurisdiction to hear revision from decisions on applications under Order 21 rule 100. Reliance has been placed on a judgment of *Sir George Rankin, C.J.*, in which he held that the Court could not in the circumstances of that case interfere. A court is not bound to interfere under Section 115 of the Code of Civil Procedure. It has a discretion, and the fact that there is an alternative remedy may influence a Court in the exercise of its discretion. It is one thing to say that the Court should not exercise its discretion in favour of the petitioner, but it is an

CIVIL.

1951.

Tulsi Charan Das v. Subal Chandra Das

*Harries, C.J.*

entirely different thing to say that it cannot. The most that can be said here is that we should not exercise our discretion in favour of the petitioner, but that of course must depend on the facts of the case. We overrule therefore the preliminary objection that no revision lies.

The short point that has to be decided is whether Order 21 rule 100 of the Code of Civil Procedure has any application where the dispossession complained of was not made in execution of the decree.

This case first came before a Single Judge who pointed out that there are two Single Judge decisions of this Court upon this question which are in conflict and he accordingly referred the case to a Division Bench.

The earlier of the two cases is *Rajendra Kishore Pal Chaudhury* v. *Asir Ulla* (1). In that case a learned Single Judge held that though the dispossession took place after the disposal of the execution case, nevertheless an application under Order 21 rule 100 lay.

In a recent case *Hare Krishna Rana* v. *Jamini Sundari Dassi* (2), Mookerjee J. took a contrary view and he held that dispossession under Order 21 rule 100 must be in course of the execution proceedings and where the alleged dispossession was not in the course of such proceedings, but subsequent to the delivery of possession an application under Order 21 rule 100 would not lie.

In my judgment the view expressed by Mookerjee J. is the correct view. Order 21 rule 100 is part of the procedure relating to execution and rule 100 provides a summary method of dealing with the dispossession in the course of execution. It would be strange that a rule in an Order relating to execution could have application after the termination of such execution. Order 21 deals with the precedure during execution and not with any procedure after execution has wholly terminated.

(1) (1937) 65 C.L.J. 416.
(2) [1950] A.I.R. Cal. 555.

Further I think it is clear from the plain words of rule 100 that it cannot apply after the execution proceedings have terminated by delivery of possession under Order 21 rule 95. Rule 100 reads thus:

> "Where any person other than the judgment debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or where such property has been sold in execution of a decree by the purchaser thereof he may make an application to the Court complaining of such dispossession."

Where the decree is one for possession and the decree-holder has obtained possession through the Court, he can no longer be truly said to be the holder of a decree for possession. After being granted possession by the Court he is the person entitled to possession. The rule only applies to holders of decree for possession not to persons who were holders of a decree for possession who have obtained possession through the Court. Similarly it appears to me that where a property has been sold in execution the dispossession must be by the purchaser obtaining possession under his purchase. Where he has obtained possession under Order 21 rule 95 he is no longer the auction purchaser endeavouring to obtain possession. He is the person in possession who has a right to eject anv body on the property as a trespasser.

From the words of the rule I am satisfied that it cannot apply to dispossession after the termination of the execution proceedings.

As I have said rule 100 provides a summary procedure in execution and the application must be made to the Court executing the decree. Once however the Court executing the decree has delivered possession to the decree-holder or the auction-purchaser, execution comes to an end and the Court is *functus officio*. Therefore an application to the Court under Order 21 rule 100 must I think be made in the execution proceedings. Dispossession in the execution proceedings is one thing. Dispossession after the execution proceedings had terminated is an entirely different matter. If the view of the learned Munsif is right then it appears to me that if this dis-

CIVIL.

1951.

Tulsi Charan Das v. Subal Chandra Das

*Harries, C.J.*

possession had taken place five or ten years later, nevertheless an application under Order 21 rule 100 would lie. If it lies after a lapse of 10 days from the date on which the Court gave possession to the auction-purchaser, it must lie five or ten years after. That is a construction which cannot possibly be given to Order 21 rule 100.

This is a case in which I think this Court should and must interfere in revision. I would therefore allow this petition, set aside the order of the learned Munsif and dismiss the application.

The rule is made absolute with costs here and below.

**G. N. Das, J.:**—I agree.

S.D.G. *Rule made absolute.*

## ORIGINAL CIVIL.

*Before Mr. Justice D. N. Sinha.*

CIVIL.

1951.

*July, 17*

## HEMBALA DASSI
*v.*
## SUNDAR SHAW AND OTHERS.*

*Contempt of court—Application by notice of motion—Form of the notice of motion—Service of notice—Nature of the proceeding for committal for contempt.*

The respondent gave an undertaking to Court to vacate the rooms occupied by them within a specified time under a consent decree but failed to do so, and consequently an application was made for contempt of Court. The preliminary point was taken that the notice of motion was not in proper form and the application should be dismissed. The question of personal service of the notice also incidentally came in.

*Held*—(i) In a contempt application, the notice of motion must be personally served before it comes into the list, even for the first time, and there is no known procedure for serving a copy subsequently.

(ii) Proceedings for committal for contempt are in the nature of *quasi* criminal proceedings and the established procedure must be strictly followed, not only in substance but also in form.

* An application for contempt of court in Suit No. 910 of 1949.

(iii) In an application for committal for contempt, the notice of motion must contain a statement as to the specific breach complained of, for which the respondents are sought to be committed

CIVIL.

1951.

Hembala Dassi v. Sundar Shaw

Application by the Defendants for an order that the Plaintiffs 1, 2 and 3 be committed to prison for contempt of this Court.

The material facts will appear from the judgment.

*Messrs. G. K. Mitter* and *A. N. Roy* for the Applicant.

*Mr. A. N. Sen* for the Respondent.

The judgment of the court was as follows:

*July, 17.*

**D. N. Sinha, J.:**—This is an application, by way of a notice of motion dated the 23rd day of May 1951 for an order that the plaintiffs Nos. 1, 2 and 3, Sundar Shaw, Kaloo Shaw and Hira Shaw be committed to prison for contempt of this Court, for costs and for such further or other order as to this Court may seem fit and proper.

The facts of this case are briefly as follows: The petitioner Sreemutty Hembala Dassi, who is the defendant in this suit, is the owner of premises No. 5, Ratan Sarkar Garden Street in Calcutta. She let out the premises to one Lalit Mohan Shaha, who in turn sub-let the same to a number of people including the respondents. The petitioner instituted a suit in this Court, being Suit No. 2449 of 1948 (*Sm. Hembala Dassi* v. *Lalit Mohan Shah*) for arrears of rent, ejectment and other reliefs and obtained a decree therein, *inter alia* for possession. The petitioner then proceeded to execute the decree, whereupon four of the sub-tenants, including the respondents, resisted execution and ultimately filed a suit in this Court, being the present suit, No. 910 of 1949, for a declaration that they were not liable to eviction, for an injunction restraining the execution of the decree obtained in Suit No. 2449 of 1948, and other reliefs. After various proceedings, this suit came up for trial and so far as the respondents were concerned, there was a consent decree whereby they gave an undertaking to Court to vacate the rooms occupied by them within 8 months from the

CIVIL.

1951.

Hembala Dassi
v.
Sundar Shaw

*Sinha, J.*

date of the passing of the decree and the defendant agreed not to charge any rent or mesne profits for that period. On the 5th February, 1951 the Solicitors for the respondents wrote to the Solicitor for the petitioner that the respondents had vacated the rooms according to the undertaking given to the Court and were occupying other rooms in the said premises as tenants under the petitioner, pursuant to an agreement with her. The Solicitor for the petitioner replied on the 7th February 1951, denying any such agreement and stating that the respondents were occupying the same rooms, in breach of the undertaking given to Court.

On the 23rd of May 1951, a notice was taken out, returnable on the 4th June 1951, praying for committal of the respondents Sundar Shaw, Kaloo Shaw and Hira Shaw, for contempt of this Court. On the 28th of May 1951, the notice was served personally on Kaloo Shaw and upon his refusing to acknowledge the same and to accept the notice on behalf of the other two respondents, the notice together with the grounds were served by affixation. On the 4th June 1951, the motion appeared in the list of new motions when Mr. A. C. Bose, the new attorney for the respondents, appeared for them and asked for time. So far as I recollect, he informed me that two of his clients were not personally served, whereupon I asked him as to whether he was prepared to fight the application upon this preliminary objection and ask for a dismissal, but he was not so prepared and asked for an adjournment to consider his position as he was not well acquainted with the proceedings yet. The objection was however recorded. Mr. Roy, who appeared for the petitioner stated that if two of the respondents had not been served his client would take such steps as she may be advised. I then find that on the same date, a fresh notice was taken out returnable on the 8th day of June 1951 (being the date to which the first notice was adjourned) and this was served on the respondents Hira Shaw and Sundar Shaw personally, with a note that on the 4th June 1951, I had directed copies of the application papers to be served upon them. I have looked into the minutes and do not find any such direction having been given. It is recorded in the minutes that the matter was adjourned till the 8th June, that Mr. Bose had taken the objection that his client was not served and concludes with the words 'steps meantime.' That must necessarily

refer to the offer of Mr. Roy to take such steps as his client may be advised. At least I did not realise that a direction was being asked for serving another notice or the same notice over again. In a contempt application, the notice of motion must be personally served before it comes into the list, even for the first time, and there is no known procedure for serving a copy subsequently. The notice that was actually served upon Hira Shaw and Sundar Shaw is not at all a copy of the original notice but a notice returnable on the 8th June 1951, although the grounds are the same. The result is that there are two notices on record and strictly speaking there ought to have been two applications.

This objection however has not been taken at the trial of the application and in view of the fact that both notices are in the same form and suffer from the same defects, and that the parties have proceeded on the footing that there was but one application, I shall proceed to treat them as such.

Mr. Sen, appearing on behalf of the respondents has taken a preliminary point which I will proceed to consider now. The notice of motion in this application (or to be more accurate, both the notices) is couched in the following terms:—

> "(a) That the plaintiffs Nos. 1, 2 and 3 Sundar Shaw, Kaloo Shaw and Hira Shaw abovenamed be committed to prison for contempt of the Hon'ble Court."

In the notice of motion, no reference has been made to the particular contempt that has been committed, nor even to the order or decree which contained the undertaking which it is alleged has been violated. The notice however contains a reference to the grounds, namely to the Petition of Sm. Hembala Dassi which does contain reference to the decree dated 6th June 1950 and the breach of the undertaking by the respondents.

The preliminary objection is that in an application for committal for contempt, the notice of motion must contain a statement as to the specific breach complained of, for which

CIVIL.

1951.

Hembala Dassi v. Sundar Shaw

*Sinha, J.*

the respondents are sought to be committed. I think that this objection is well-founded and that the notice (or notices) is defective.

*Mr. Oswald* in his book on *Contempt of Court*, states the law thus:

> "A notice of motion for attachment must state in general terms the grounds of the application and it is safest to specify in it the evidence intended to be used to support it. If it does not state the grounds for the motion it is irregular and the motion will be refused *Taylor* v. *Roe* (1). The same rule has always been applied to notices of motion to commit . . . . . Care should be observed in settling serving and proceeding upon a notice to commit. or for leave to issue a writ of attachment, because the Court is 'jealous of the personal freedom of the subjects of the crown,' and where the liberty of the subject is in question always requires the utmost strictness in procedure. Applications affecting the liberty of the subject are matters *stricti semi juris* . . . . . A direct non-compliance with the rules of practice as to committal and attachment ought not to be condoned by the Court."

The matter is thus dealt with in *Halsbury* (*Vol. 7 page 40*):—

> "The notice of motion must state in general terms the grounds of the application, and where the motion is founded on evidence by affidavit a copy of any affidavit intended to be used must be served with the notice of motion, where the ground of the application is disobedience to an order of the Court which might be disobeyed in several ways, the particular breach alleged must be specified."

This practice has now been incorporated in England, in the Rules of the Supreme Court Order 52 rule 4 which is in the following terms:—

(1) [1893] 1 W.N. 14.

"Every notice of motion to set aside, remit or enforce an award or for attachment, shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion."

The attachment mentioned above is not the usual kind of attachment in execution of a decree but a writ of attachment which commands the Sheriff to attach a person and bring him before the Court touching a contempt alleged. (*Halsbury Vol. 7 page 37*) Attachment is the usual remedy for breach of an order to do an act, and committal for the breach of a prohibitory order, although either remedy is applicable: *Harvey* v. *Harvey* (1); *Halsbury Vol. 7 page 40*. In India there is no distinction between attachment and committal: *Bai Moolibai* v. *Chunilal Pitambar* (2). Mr. Mitter has argued that this technical rule of English law should not be applied to contempt proceedings in India and that reference in the notice of motion to the grounds, which contains a statement of the contempt which has been committed is quite enough.

This very point however came up for decision in *Jayantilal Hiralal & Co.* v. *Waman Narayen Velinkar* (3), where Blackwell J., said as follows:—

"The next point taken by the Advocate-General is that the charge ought to have been specifically set out in the notice of motion. It is merely stated in the notice of motion that the Court will be asked for an order to commit the respondent to jail for contempt of the Court's order. What the particular contempt is, is not stated. It is contended in answer by Mr. Engineer that sufficient particularity as to the nature of the charge is given in para. 9 of the affidavit of Waman Narayen Velinkar dated 11th December 1931 and that notice is given by the notice of motion that the affidavit will be relied upon. His submission is that all that is required is that the respondent shall be given notice of the precise charges against him in

(1) (1884) 26 Ch. D. 644.
(2) (1909) I.L.R. 33 Bom. 650.
(3) [1932] A.I.R. Bom. 638.

CIVIL

1951.

Hembala Dassi
v.
Sundar Shaw

*Sinha, J.*

order that he may have an opportunity of knowing them and of meeting them if he can . . . . . In my opinion the precise breach or breaches of the order complained of should be set out in the notice of motion itself and the respondent should not be left to ascertain if he can from the affidavit relied upon in support what the charges are. It may well be that in para. 9 of the affidavit in support notice of the breaches complained of has been given in this particular case. But in my judgment, a respondent ought not to be left to gather, if he can, from the terms of the affidavit in support what is the precise nature of the charge brought against him. In this connection it is useful to refer to the form of notice of motion for contempt for breach of a judgment or order which is set out in *App. 2 at page 272 in Oswald on Contempt*. It will be seen that the form contemplates the precise nature of the breach of the judgment or order being set out in the notice of motion. I hold therefore that the notice of motion in the case is defective."

So far as I am aware, this case has never been dissented from in our Court and is quoted with approval by Mr. Ormond in his annotations to our *Rules (Original Side page 118)*. I fully agree with the statement of the law as stated by Blackwell J. Proceedings for committal for contempt are in the nature of Quasi Criminal proceedings and the established procedure must be strictly followed, not only in substance but also in form. The jurisdiction of the High Court to imprison for contempt is a jurisdiction which it has inherited from the old Supreme Court and was conferred upon that Court by the Charters of the Crown which invested it with all the powers and authority of the then Court of King's Bench and of High Court of Chancery in Great Britain. The argument therefore, that we should not follow or import the English practice relating to this particular branch of law, cannot be accepted. Nothing is more prized by that law than the liberty of the subject, and I should be sorry to hear that we should not import or incorporate in our legal system so excellent a principle. The rules that the exact breach of an order of Court or of the contumacious Act complained of, should be set out in the notice of motion, imposes no heavy burden. As pointed out by Lord Atkin in his *Forms and Precedents Vol. 7 page*

54, "where the contempt consists in disobeying an order a motion to attach 'For default in obeying an order dated etc.' is a sufficient statement of the grounds of the application . . . . . ." All that was required in this notice of motion was to state that the committal was asked for for not complying with an undertaking given to Court, as incorporated in the decree dated the 6th June 1950. In the absence of such a statement, the notice is defective and must be discharged. I must also mention another point taken by Mr. Sen on behalf of the alleged contemnors. He says that the point in issue is a contested question of fact and in a contempt preceeding it is not appropriate that such a point should be decided. He cites *Homi Rustomji Pardivala* v. *Sub Inspector Baig and others* (1). In that case Harries C.J. held that proceedings for contempt of Court are of a summary nature and are not suitable for the decision of a hotly contested question of fact. Whether a question of fact is an acutely controversial one must depend upon the circumstances of each case. In my opinion, the learned Chief Justice did not intend to lay down that a committal of contempt is only possible where the facts are not in dispute. In most cases they are disputed. The question that arises here is a very simple one. The respondents gave an undertaking to vacate the rooms occupied by them by a given time. According to them they have vacated the rooms originally occupied by them and are occupying other rooms under a new agreement with the landlady. The petitioner denies that they have vacated the rooms originally occupied, and denies the new agreement. The really controversial matter is the new agreement, but I am not at all concerned with that. All I have to decide here is as to whether the respondents have vacated the rooms originally occupied by them within the prescribed period, and thereby honoured their undertaking to Court. That seems to me to be a simple issue which I can try on evidence and decide. Whether an undertaking has been honoured or not is a question that must arise inevitably where an application is made for committal for contempt on the ground of a breach of that undertaking. Therefore, however summary such a proceeding may be, that fundamental question must be determined, unless of course the circumstances are such that the question cannot be determined except by an elaborate trial. The proceedings being '*in brevi manu*', all elaborate-

(1) [1944] A.I.R. Lah. 196.

CIVIL.
1951.
Hembala Dassi
v.
Sundar Shaw
*Sinha, J.*

ness must be avoided, but it does not follow that the proceedings must consist of uncontested matter only. Hundreds of cases have been disposed of during the last few years where landlords have agreed to grant time to people to vacate, on the strength of undertakings given to Court. If such undertakings are not rigorously enforced, this would be doing great injustice to them. If it transpired in this case that respondents had not only broken an undertaking solemnly given to Court but tried to support it by false affidavits, they would have had to suffer the consequences. But the seriousness of the matter is also a measure for the amplitude of precautions that must be taken to see that the form of indictment and the trial are absolutely flawless. It must not only comply with the rules in substance but also in form, '*Strictissimi juris.*'

In the circumstances, this application fails and must be dismissed. As it has failed only on a technical ground, I make no order as to costs. Only one order is to be drawn up.

*Charu Chandra Bose*: Solicitor for the Applicant.

*A. C. Bose*: Solicitor for the Respondents.

S.K.R.C. *Application dismissed.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Arthur Trevor Harries, Chief Justice and Mr. Justice S. B. Sinha.*

CIVIL.
1949.
*March, 21.*

## KANAHYALAL RUIA
*v.*
## CORPORATION OF CALCUTTA AND OTHERS.*

*Specific Relief Act (1 of 1877) Section 45—Sanction of building plan by the Corporation of Calcutta—Unauthorised and illegal constructions—Provisions of Rules 23, 30, 33 of Schedule 17 of the Calcutta Municipal Act (Bengal Act III of 1923)—Section 319 of the Act—Definitions of "domestic building" and "dwelling house"—Exception under the Proviso (ii) to Rule 30(2) whether relates to three storied buildings only—Power of the Corporation to institute proceedings under section 363 or under*

* Appeal from Original Order No. 132 of 1948 against the decision of *Sen J.*, dated April 15, 1948.

CIVIL.

1949.

Kanahyalal Rula
v.
Corporation of Calcutta.

*section 493 of the Act, whether discretionary or obligatory—Interpretation of statute—Chapter XXIX Rule 5 of the Original Side Rules—Whether adjudication of legal right is intended or can be made as between the applicant and any person who may be affected by the act to be done or forebome under section 45 of the Specific Relief Act.*

Section 319 of the Calcutta Municipal Act prohibits the erection of a building other than with in accordance with the provisions of Chapter 21 of the Act and of Schedule 17 thereof and any order, rules or bye-laws made under the Act.

It is for Court to be satisfied as to whether the building sanctioned is a dwelling house or domestic building. If the Court comes to a conclusion that it is dwelling house, treatment by the Corporation of the building as domestic building for the purpose of granting sanction to it is of no avail.

The intention of the legislature has to be gathered from the words used in the section. The words used have to be construed in their natural and ordinary meaning, unless the construction leads to absurdity.

The expression " three storied building " grammatically means a building which has three storeys and neither more nor less storeys. To read the word as meaning " building having at least three storeys " would involve reading words into the Section which are not there.

It is for the legislature to make clear provisions in rule 30(2) and it is idle to speculate on the policy or intention of the legislature when the words employed taken in their ordinary and grammatical sense do not effectuate the supposed policy or intention and are free from ambiguity. It is better in the circumstances to stick to the ordinary rule of construction and not to be led away by any supposition of the intention of legislature not expressed in the Section.

It is clearly incumbent on the corporation to forbear from sanctioning the plan in violation of the provisions of the Calcutta Municipal Act and such forbearing is consonant to right and justice.

It is also clear that the applicant has no other specific and adequate legal remedy.

The provisional sanction granted by the Corporation being illegal, an order would be made on the Corporation to forbear from issuing the sanction and to deal with the plan submitted in accordance with law.

If the Corporation is satisfied that the erection of a building is illegal and unauthorised, it is obligatory on it to initiate proceedings either under section 363 or under section 493 of the Calcutta Municipal Act.

CIVIL.

1949.

Kanahyalal Rula
v.
Corporation of Calcutta.

Where a public body or officer is vested with a power in the interest of the public and the circumstances are such as to show the exercise of discretion on the part of the donee of the power could not have been intended, it is the duty of the person in whom the power is vested to exercise it provided the conditions precedent for the exercise of the power exist.

Chapter XXIX Rule 5 of the Original Side Rules provides for the rule being served on any person who may be affected by the act to be done or forborne. Such a person, however, takes part in the proceeding only for the purpose of showing cause against an order being made on the public officer of the Corporation. No adjudication and legal right is intended or can be made as between the applicant and such person in a proceeding under section 45 of Specific Relief Act.

*Held* further that the Corporation has sanctioned the plan in contravention of Rules 28, 30 and 33(2) of the Calcutta Municipal Act.

Appeal by the Applicant.

Application under section 45 of the Specific Relief Act against the Corporation of Calcutta complaining of a certain sanction given by the Corporation for a building and the construction thereof.

The material facts will appear from the judgment.

*A. K. Sen* for the Appellant.

*R. S. Bachawat* for the Respondent.

*G. K. Dutta* for the Corporation of Calcutta.

The judgments of the Court were as follows—

*March, 21.*

**S. B. Sinha, J.:**—This is an appeal from the judgment of Sen J. dated April 15, 1948 whereby he dismissed the appellant's application under section 45 of the Specific Relief Act against the Corporation of Calcutta (hereinafter referred to as the Corporation) and Muhammed Siddique and Muhammed Yusuf (hereinafter called the said respondents) complaining of a certain sanction given by the Corporation for a building and the construction thereof.

The appellant is the owner of premises No. 125, Harrison Road, which is a five storeyed building having a verandah on

each floor facing Harrison Road and a window on each verandah from the second floor upwards on the west overlooking premises No. 140, Chittaranjan Avenue. To the West of the said building and adjoining thereto are premises No. 140, Chittaranjan Avenue of which the said respondents are the owners.

In the year 1945, the said respondents submitted a plan to the Corporation for erection of a one storeyed building on the said premises, which was sanctioned on March 31, 1945. The said respondents submitted another plan for addition of 2nd to 5th storeys to the said one-storeyed building with projecting verandahs over Chittaranjan Avenue and Harrison Road. The Corporation sanctioned the plan on March 26, 1946. The sanction of both the said plans was given subject to the respondents doing certain things. We were told that final sanction had not yet issued though a substantial portion of the building had been erected.

No notice was given to the plaintiff at the time the plans were submitted or sanctioned.

According to the appellant, the said respondents started construction of the building in the beginning of 1947. In or about September 1947 the said respondents in deviation of the sanctioned plan started constructing on the back space of their premises and flush against the western wall of the appellant's premises with the result that the western windows of the appellant's building were closed up. On September 30, 1947 the Corporation served a notice on the said respondents under section 365 of the Calcutta Municipal Act 1923 requiring them to stop the unauthorised construction on the back space.

The appellant applied to the Additional Chief Presidency Magistrate, Calcutta for an injunction restraining the unauthorised construction, whereupon an injunction was made restraining the said respondents from continuing the construction. It appears that the police were posted from time to time to stop continuance of the unlawful construction.

On November 20, 1947, the appellant through his Solicitors wrote to the Corporation complaining of the sanction which was

CIVIL.

1949

Kanhyalal Ruia
v.
Corporation of Calcutta.

*Sinha, J.*

said to have been illegally granted by the Corporation and calling upon it to deal with the plan according to law and to stop the unauthorised construction. No reply was given to the letter.

On December 2, 1947 notice of motion was taken out for an order on the Corporation to deal with the plan for sanction according to law, to deal with the unauthorised constructions, already made by the said respondents, according to law, for injunction on the said respondents from continuing the illegal and unauthorised construction and for an order on them to demolish the construction already made.

The application was dismissed by Sen J. on April 15, 1948 as I have already stated.

The appellant's case is that the building has been sanctioned by the Corporation illegally and in violation of the building regulations contained in the Calcutta Municipal Act. It is said that the sanctioned plan infringes and offends against the provisions of rules 23, 30, 33(b) of Schedule 17 of the said Act.

Section 319 of the said Act prohibits the erection of a new building otherwise than in accordance with the provisions of Chapter 21 of the Act and of Schedule 17 thereof and any order, rules or bye laws made under the Act.

Rule 23 so far as is material for this case, provides that the total area covered by all the buildings on any site used for a dwelling house shall not exceed two-thirds of the total area of the site. Rule 30 provides that at the back of every domestic building there shall be kept an open space of such width that any of a series of imaginary lines drawn across such space at an angle of sixty three and a half degrees with the horizontal from points on a level with the plinth of the building and situated on that side of the said space which is furthest from the building, shall not intersect any portion of the building, other than parapets of a certain height. Proviso (1) to rule 30 provides that the minimum width of such space shall be ten feet. Proviso (ii) is as follows:

"In the case of three storeyed buildings, the angle referred to in this rule shall be increased from sixty three and a half degrees to sixty eight degrees."

Rule 33(2) is as follows:—

"Every such courtyard and open space shall form part of the site of the building, shall be open to the sky through out the entire area, and shall be kept accessible for the purpose of cleansing, and no structure shall be erected within or above, or so as to project over the same.

Provided that—

(a) a one-seated or two-seated connected privy or a privy with a bathroom attached thereto or two connected privies, not exceeding forty square feet in floor area in the aggregate, exclusive of walls, may be erected in the open space left under rule 30, sub rule (2)."

There is no denial that the Corporation has sanctioned the erection of building on the site which cover more than two-thirds of the total area of the site which is 1635 sq. ft. The area which according to rule 23 should have been kept open is 545 sq. ft. but the Corporation has sanctioned construction on the site leaving only 434 sq. ft. open. It is therefore contended that the sanction of the Corporation is in contravention of rule 23. The contention is answered by saying that the building sanctioned is not a dwelling house but a 'domestic building.'

Section 3(23) defines a domestic building:

"Domestic building" includes a dwelling house and any other masonary building which is neither a "building of the Warehouse Class" nor a "public building" as defined in this section, nor a place exclusively used for public purpose.

Section 3(27) defines a dwelling house:

"Dwelling house means a masonry building constructed used or adapted to be used wholly or principally for human habitation."

CIVIL.

1949.

Kanhyalal Rula v. Corporation of Calcutta.

*Sinha, J.*

It will appear on a reference to the plan which was sanctioned that the ground floor of the proposed building is intended to be let out in shops and the first floor as offices. The other floors are clearly intended for letting out as residential flats. Each of the flats from the 3rd storey upwards contains store, kitchen, bathrooms and it can hardly be supposed that the floors, other than the ground and the first floors, were intended to be used as offices. In any event the building is "adapted to be used" for human habitation. There can be no doubt on a reference to the plan that the building is intended or at least adapted to be used principally for human habitation. It is not a building for office or business purposes, with a small portion set apart for the habitation of Durwans, Caretakers etc. It is contended that the Corporation sanctioned the building as a "domestic building" and not as a "dwelling house." It is not however open to the Corporation to sanction a building, which is within the said definition of dwelling house, as a domestic building with the object or result of disregarding the statutary provisions of rule 23. It is for the Court to be satisfied as to whether the building sanctioned is a dwelling house or a domestic building. If the Court comes to the conclusion that it is a dwelling house the treatment by the Corporation of the building as a domestic building for the purpose of according sanction to it is of no avail. The Corporation cannot give itself power to disregard the provisions of rule 23 by shutting its eyes as to the real nature of the building sought to be erected. I think therefore that the proposed building is a dwelling house, and the plan has been sanctioned in disregard and violation of the rule 23.

The appellant's second complaint relates to the violation of rule 30. It will appear from the plan annexed to the petition that if the angle required under rule 30 is sixty three and a half degrees, the line drawn at that angle intersects the second third and fifth storeys of the proposed building. If the correct angle is sixty eight degrees the line does not intersect any portion of the building.

The question is whether, the correct angle is sixty three and a half or sixty eight degrees. The learned judge came to the conclusion that the correct angle under rule 30 is sixty eight degrees. The solution of this question depends on the construction and effect of Rule 30.

It will be observed that rule 30(2) provides for uniform angle of sixty three and a half degrees for determining the open space required to be kept at the back of every domestic building. Proviso (ii) to rule 30(2) makes an exception in favour of three storeyed buildings in which case the angle is permitted to be increased to sixty eight degrees. The contention of the respondents is that the increase in the angle is intended not only for 'three-storeyed buildings' that is to say 'buildings having three storeys' but also to higher buildings i.e. 'buildings having more than or at least three storeys.' This contention was upheld by the learned Judge.

The intention of the Legislature has to be gathered from the words used in the section. The words used have to be construed in their natural and ordinary meaning, unless the construction leads to absurdity. If the grammatical construction is adopted, the exception applies to only one class of buildings, namely, 'three storeyed buildings.' No body refers to a 'four storeyed' building as a 'three storeyed building' though it has three storeys and one storey more. The expression 'three storeyed building' grammatically means 'a building which has three storeys and neither more or less storeys.' To read the word as meaning 'buildings having at least three storeys' would involve reading words into section which are not there.

Learned counsel argued that the grammatical construction would involve inconvenience to owners of land and the keeping of more back space than the Act intended in case of buildings higher than three-storeyed ones. It was pointed out that if an owner wanted to add a fourth storey to a three-storeyed building which had been already erected at the required angle of sixty eight degrees he could not do so without demolishing a portion of the third storey in order to conform to the required angle of 63½ degrees. It was also argued that if buildings having more than three storeys had to keep back space enough to yield the angle of 63½ degrees, too much space would be taken up to provide the back space and it would be difficult and in many cases impossible to build. The considerations, in my opinion are not enough to displace the plain and grammatical construction of the rule. *Prima facie,* it would seem that more back space should be required for taller buildings in order to provide more

CIVIL.

1949.

Kanahyalal Ruia
v.
Corporation of Calcutta.

*Sinha, J.*

open space for passage of air and light. There are considerations for and against increasing the angle to sixty eight degrees in respect of buildings having more than three storeys. It was for the Legislature to make clear provisions in rule 30(2) and it is idle to speculate on the policy or intention of the legislature when the words employed taken in their ordinary and grammatical sense do not effectuate the supposed policy or intention and are free from ambiguity. It is better in the circumstances to stick to the ordinary rule of construction and not be led away by any supposition of the intention of the Legislature not expressed in the section.

It may be noticed that in rule 22 schedule 17 of the Calcutta Municipal Act 1899, the angle to be provided by the back space was sixty three and a half degree and there was no exception in favour of a three-storeyed building or any other class of buildings.

I am therefore of opinion that the correct angle to be observed in the case of the proposed building is sixty three and a half degree and that sanction has been accorded by the Corporation in violation of the provisions of rule 30(2).

The third item of complaint is in respect of sanction for construction of privy and bath rooms on the back space. Rule 33(2) proviso (a) permits erections in the open space kept under rule 30(2) of privy and bath room not exceeding forty square feet in floor area in the aggregate. If I am right in my conclusion that the open space required under rule 30(2) has not been kept it follows that erection of privy on the back space cannot be permitted and if permitted, would be in contravention of rule 23, because permission can only be given when the back space required under rule 30(2) has been provided.

If follows that the Corporation has sanctioned the plan in contravention of rules 23, 30 and 33(2) of the Calcutta Municipal Act.

There can be no doubt that the appellant's premises would be affected and its amenities interfered with if the erection of the proposed building in accordance with the sanctioned plan

is allowed. It is said that the Corporation has sanctioned the plan bonafide and therefore this Court cannot interfere. It is clearly incumbent on the Corporation to forbear from sanctioning the plan in violation of the provisions of the said Act and such forbearing is consonant to right and justice. Even if the Corporation has acted bonafide which is by no means clear, it does not matter. It is also clear that the applicant has no other specific and adequate legal remedy.

The provisional sanction granted by the Corporation being illegal, an order should be made on the Corporation to forbear from issuing the sanction and to deal with the plan submitted in accordance with law.

The next point related to the unauthorised construction of the back space in deviation of the plan sanctioned by the Corporation. There is and can be no doubt that this construction has prejudicially affected the appellant's premises and has shut out the plaintiff's light and air through the western windows and is not covered by any sanction of the Corporation and is in utter disregard of the express prohibition contained in rule 33(2) schedule 17 of the Act.

The Act empowers the Corporation to institute proceedings in the Court of a Magistrate under section 363 for demolition of the illegal construction or under section 493 for imposing a penalty on the defaulting owner.

On September 30, 1947 notice was given under section 365 of the Act by the Corporation to stop the progress of the unlawful erection then being made by the respondents. No step has however been taken by the Corporation for sixteen months to institute proceedings either under section 363 or under section 493. Power is given to the Corporation to institute proceedings in the interest and for the benefit of the public. The Corporation does not dispute that the construction is illegal and unauthorised. It is the incumbent duty of the Corporation to exercise the power with which it is vested for the benefit and in the interest of the public. If the Corporation does not take any step neither the appellant nor any member of the public can initiate proceedings. If the Corporation does not take any step, the result would be that the un-

CIVIL.

1949.

Kanahyalal Ruia v. Corporation of Calcutta.

*Sinha, J.*

authorised construction will remain. The circumstances are such that the non-exercise of the power by the Corporation could not have been intended by the Legislature. The exercise of the power is therefore obligatory and not discretionary.

If the Corporation is satisfied that the erection of a building is illegal and unauthorised, it is obligatory on it to initiate proceedings either under section 363 or under section 493. There is no question in this case that the Corporation is satisfied about the illegality of the construction. There is enough authority for the proposition that where a public body or Officer is vested with a power in the interest of the public and the circumstances are such as to show that the exercise of discretion on the part of the donee of the power could not have been intended, it is the duty of the person in whom the power is vested to exercise it provided the conditions precedent for the exercise of the power exist.

The Corporation must therefore be ordered to do its duty and deal with the unauthorised construction already made by the respondents according to law. The appellant asked for an injunction on the respondents restraining them from proceeding with the construction and for a mandatory injunction to pull down and demolish the construction already made. I do not think there is any jurisdiction to make such an order. In an application under Section 45 of the Specific Relief Act, order can be made only on a public Officer of a Corporation and not on anybody else. Chapter 29 Rule 5 of the Original Side Rules provides for the rule being served on any person who may be affected by the act to be done or forborne. Such a person however takes part in the proceedings only for the purpose of showing cause against an order being made on the public Officer or the Corporation. No adjudication of legal rights is intended or can be made as between the applicant and such a person in a proceeding under Section 45. Injunction can be granted in a proceeding against a party thereto only when an adjudication of a legal right is involved in the proceeding against that party. It is true that injunction has been granted in many cases on the Original Side against a person joined under Chapter 29 Rule 5 of the Original Side Rules in cases where the application under Section 45 of the Specific Relief Act has succeeded against the Public Officer or Corporation

[See *A. C. Mahomed* v. *Corporation of Calcutta* (1); *In re. Lakshmi Moni Dasi* (2); *Hirendra Nath Datta* v. *Corporation of Calcutta* (3)]. But it is to be observed that this question was not argued or considered in these cases. Gentle J. in *Prosad Das Sen* v. *Corporation of Calcutta and another* (4) doubted the jurisdiction of the Court to make any order against a person joined in a proceeding under Section 45 of the Specific Relief Act under Chapter 29 Rule 5 of the Rules. He observed: "That (joining a party under Chapter 29 Rule 5) would seem to be a desirable course when any person, other than the public Officer or Corporation, might be affected by an order made against the public Officer or Corporation so as to give him an opportunity to show cause against such an order being made. I cannot find in Rule 5 any provisions that a private person can be joined in proceedings under Section 45 to the extent that an order against him can be made for the relief which may be granted under the Section." I respectfully agree with the observation of Gentle J.

There will be an order requiring the Corporation to deal with the plans submitted by the respondents Muhammad Siddique and Muhammad Yusuf in accordance with the provisions of the Calcutta Municipal Act 1923 and Schedule 17 thereto and to deal with the unauthorised constructions already made by the said respondents in accordance with the provisions of the said Act.

The respondents will pay the costs of the Appeal and of the application. Certified for two Counsel.

**Harries, C.J.:**—I agree.

*Messrs. Khaitan & Co.*: Solicitors for the Appellants.

*Messrs. T. C. Mitra, N. C. Bural & Pyne*: Solicitors for the Respondents.

S.K.R.C. *Appeal allowed in part.*

(1) (1940) 45 C.W.N. 408. (2) [1941] I L.R 1 Calc 16.
(3) [1941] I.L.R. 1 Calc. 435
(4) Unreported judgment of *Gentle, J.* dated 11-6-46 in an application under section 45 of the Specific Relief Act.

## ORIGINAL CIVIL.

*Before Mr. Justice P. B. Mukharji.*

CIVIL.

1951.

*February, 15.*

# D. M. JACKSON
*v.*
# CLIFFORD HOCKLEY.*

*Civil Procedure Code (Act V of 1908)—Order 8 rule 6—Set-off, if includes counter claim—Distinction—Meaning of—Ascertained sum, what is—Claim of defendant, if can be decreed against plaintiff in the same action—Practice—If plaintiff gives up his claim, whether a decree can be passed in favour of the Defendant based on his claim in set off.*

In a suit for damages the defendant claimed a set off of arrears of rent and damages to furniture, in course of trial the plaintiff gave up his claim for damages and resisted the claim for set off on the ground that set off is not maintainable:

*Held*—(1) The plaintiff by withdrawing the claim laid in the plaint cannot convert what was to start with a set off into a counter claim. The character of the claim is first to be determined by reference to the pleadings and not by plaintiff's refusal to prosecute.

(2) Although the word 'set off' only is used in Order 8 rule 6 and not the word 'counter claim,' the claim to an ascertained sum of money may not only be what is strictly termed set off but what is also a counter claim for which decree is to be given against the plaintiff in the same action. The absence of any rule or provision for a counter claim is not such a great lacuna of deprivation as has ordinarily been supposed.

(3) Claim for loss of damage done to furniture is not a claim for an ascertained sum of money. Valuation put by the defendant on those damages does not make the damages a claim for ascertained sum of money.

(4) Order 20 rule 19 does not take away or detract anything from Order 8 rule 6. It only says that where there is a cross claim the dues of both the plaintiff and the defendant should be found and decreed. This does not mean that where the plaintiff fails to substantiate his claim, the defendant is to be deprived of his claim for a set off. In such cases the rule 19 of Order 20 is satisfied by dismissing plaintiff's claim and allowing defendant's claim.

* Original Civil Suit No. 1094 of 1947.

English and Indian case law discussed.

CIVIL.

1951.

D. M. Jackson
v.
Clifford Hockley.

Suit for recovery of Rs. 36,086/- as damages alleged to have been caused to the plaintiff's articles and furniture by the wilful and wrongful interference of the defendant.

The material facts will appear from the judgment.

*Mr. B. K. Ghose* for the Plaintiff.

*Mr. N. Barwell* and *Mr. B. Das* for the Defendant.

The judgment of the court was as follows:—

*February, 15.*

**P. B. Mukharji, J.:**—This is another suit by the same plaintiff against the same defendant as in Suit No. 865 of 1947, where I delivered judgment yesterday. This suit is for the recovery of a sum of Rs. 36,086/- as damages alleged to have been caused to the plaintiff's articles and furniture by the wilful and wrongful interference of the defendant. The defendant in his written statement has denied the allegations and pleads in paragraph 12 a set-off in the following terms:—

> "In any event, the defendant claims herein by way of set-off decree for Rs. 4,587/8/- being the aggregate of sums respectively mentioned in paragraph 5 and 7."

Paragraph 5 of the written statement mentions damages due to undelivered furniture and also to actual damage done to the defendant's furniture. Paragraph 7 is the claim for rent and/or mesne profits. Paragraph 7 has been amended by consent of parties to make it clear that for the months of November and December 1946, arrears of rent are claimed and for the months of January, February and March, 1947 rent or mesne profits. The amended paragraph 7 of the written statement reads as follows:—

> "On the said last mentioned date, there was due and owing from the plaintiff to the defendant rent in respect of the said premises for the months of November and December, 1946 and and thereafter for the months of January,

CIVIL

1951.

D. M Jackson
v.
Clifford Hockley.

*Mukharji, J.*

February and March, 1947, *rent or mesne profits* at the said rate. The sum so owing amounted to Rs. 2,187/8/-. The plaintiff to the date of these presents has not paid the said sum or any part thereof inspite of demand."

It was a formal amendment although strictly speaking, perhaps not necessary. Under the Calcutta Rent Ordinance 1946, even after the expiry of tenancy, a tenant who continues to pay what is called the statutory rent, the landlord is liable to accept it that by pleading rent there can be no waiver by pleading under such rent law. But as I have not decided the question or whether she was a statutory tenant or not in the other suit, No. 865 of 1947 between the two parties in the judgment which I delivered yesterday, the amendment was made as a matter of abundant caution. Counsel for the plaintiff consented to the amendment.

It is agreed by the Counsel on either side that evidence in the said suit No. 865 of 1947 between the same parties is to be treated as evidence in the present suit No. 1094 of 1947. It is also agreed by counsel on either side that no further evidence is to be called in this suit. In fact, neither the plaintiff nor the defendant has called any fresh evidence in this suit.

Counsel for the plaintiff has given up the plaintiff's claims for damages and now argues that the defendant is not entitled to proceed with his claim made in the written statement, it being only a set-off The main argument on this point is this that when in a suit like this, the plaintiff withdraws or given up her claim, there is nothing against which the defendant's claim for set-off can be given. On the common sense, there is a good deal to be said in favour of such argument. I have, however come to the conclusion that in law, it is permissible for defendant to prove his claim to set-off and obtain judgment thereon even in a case where the plaintiff has withdrawn his claim against the defendant.

This question raises the problem as to the character and nature of a set-off and a counter-claim. A counter-claim under the Civil Procedure Code or under the Rules of this High Court is not permissible. It has been held in a number of decisions and I need only refer to the case of *re. Hiralal*

*Banerjee* (1), a decision of Lort-Williams J. The same view was also expressed by McNair J. in *Baijnath Chauby & Co.* v. *Varajlal Moolji* (2). The Bombay High Court provides by its Rules for a counter-claim as will be seen from the decision of *Hirji Ramji* v. *Daulatram Ratanji* (3), a decision of Kania J. We have no comparable Rule of this High Court which can be said to be on a par with Rule 130 of the Bombay High Court Rules which permits the filing of a counter-claim.

In my judgment the defendant's claim for Rs. 4,587/8/- as made in paragraph 12 of the written statement is essentially and fundamentally a set-off and not a counter-claim in this case. The plaintiff's suit was for a much larger amount, namely Rs. 36,086/-. Taking therefore the plaint and the written statement, the defendant's claim for Rs. 4,587/8/- is therefore a set-off. The plaintiff by withdrawing the claim laid in the plaint at the time of hearing of the suit cannot convert what was to start with a set-off into a counter-claim. Whether in the particular facts of a case the claim of the defendant is to be treated as a set-off or a counter-claim is in my view first to be determined and judged by reference to the pleadings in suit and then also by reference to the nature and character of the plea and not by the plaintiff's refusal to prosecute the suit. The nature of the pleading in this suit convinces me that the defendant's claim is clearly a claim for a set-off and is not a counter-claim. Not arising from the same transaction the claim for set-off in this case is a legal set-off and not in the nature of an equitable set-off.

The leading decision of this High Court on the point is to be found in *Rai Harendra Nath Chaudhuri* v. *Rai Sourindra Nath Chaudhuri* (4). Mitter J. observes at pp. 883-884: —'Moreover, set-off is a plea in defence, a plea available to the defendant only. In its original and strict sense, it is a defence pure and simple, which by adjustment would either wipe off or reduce the plaintiff's claim for money as made in the suit. In its enlarged sense, and that is of statutory creation, it is a defence and a counter-claim combined, defence to the extent

(1) (1937) 41 C.W.N. 603 (604).
(2) (1944) 48 C.W.N. 481 (482).
(3) [1940] I.L.R. Bom. 10.
(4) [1942] I.L.R. 2 Calc. 485; 46 C.W.N. 882.

CIVIL.

1951.

D. M. Jackson v. Clifford Hockley.

*Mukharji, J.*

of wiping out of plaintiff's claim and a claim by the defendant in the suit itself for the balance.' The observation of Cockburn, C.J. in *Stoke* v. *Taylor* (1), the plea of set-off can be used in the way of defence to the plaintiff's action, as a shield, not as a sword,' is to be understood in the light of the statutory provisions in this country as contained in Order 8, rule 6 and Order 20, Rule 19 of the Code of Civil Procedure. The Rules of the Supreme Court in London on the question of set-off are very different from those we have in this country. Order 19, rule 3 of the Supreme Court Rules reads as follows:—

> "A defendant in an action may set-off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such a set-off or counter-claim shall have the same effect as the statement of a claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may on the application of the plaintiff before trial if in the opinion of the Court or the Judge, such set-off or counter-claim cannot be conveniently disposed of in that pending action or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

As I have already indicated, there is no provision for counter-claim under Order 8, Rule 6 of the Civil Procedure Code or under any other provision of the Civil Procedure Code. Equitable set-off was derived from the civil law and was exercised long before any legislation on the subject in England. That will be clear from *Middleton* v. *Pollock* (2), and *Exparte Stephens* (3), and *Peat* v. *Jones & Co.* (4), Set-off at law was founded on statutes beginning from section 2 of George II's charter 22. That is as far as the law in England is concerned. Mitter J. in the case I have just referred to (5) comes to this conclusion at page 885:— "Although the word 'counter-claim' is not used in our

(1) (1880) L.R. 5 Q.B D. 569.
(2) (1875) 20 Eq. 29 (34)
(3) (1805) 11 Ves. 24.
(4) (1881) 8 Q.B.D. 147.
(5) [1942] I.L.R. 2 Calc. 485; 46 C.W.N. 881.

statute and although generally speaking a counter-claim is incompetent under procedure laid down in the Code of Civil Procedure and such a claim by the defendant must be enforced in a separate suit [*Currimbhoy and Company Limited* v. *Creet* (1)] Order VIII, rule 6 read with Order XX rule 19 does permit what is in essence a counter-claim of a specific kind, namely where the counter-claim is in respect of an ascertained sum of money exceeding the plaintiff's demand and, in that case, it is permissible for the Court to pass a decree in favour of the defendant for the excess sum over the plaintiff's demand. Although the word 'set-off' only is used in Order 8 rule 6 and not the word 'counter-claim' also, the claim to the ascertained sum of money which the Code permits the defendants to set up in the plaintiff's action for money may not only be what is strictly termed set-off but what is also a counter-claim. If the claim set up by the defendant is in respect of a debt which is less than or equal to the plaintiff's claim in the suit, it is a plea of set-off pure and simple, but if it exceeds the plaintiff's claim it is to the extent of the excess a cross-claim, for the excess he is to be given a decree against the plaintiff in the same action."

The observations that have been made from time to time in the cases, I have mentioned above, that there is no provision for a counter-claim should therefore, in my view, be read in the light of this decision of Mitter J. I respectfully agree with the view expressed by Mitter J. in *Harendra Nath Choudhury* v. *Sourindra Nath Chaudhury* (2) and especially those views which are expressed in the passages which I have just quoted. The absence, therefore, of no rule or provision for a counter-claim is not, in my view, such a great lacuna or deprivation as has ordinarily been supposed.

It is necessary here to examine the actual provisions of Order 8 rule 6 of the Civil Procedure Code in order to find out what a set-off is intended to mean under the Code which we have to administer.

(1) (1932) L.R. 60 I.A. 297 (303).
(2) [1942] I.L.R. 2 Calc. 485; 46 C.W.N. 882.

CIVIL.

1951.

D. M. Jackson
v.
Clifford Hockley.

*Mukharji, J.*

Sub-rule (1) of Order 8 rule 6 permits a defendant to claim a set-off against the plaintiff's demand, in a suit for the recovery of money, any ascertained sum of money legally recoverable by the defendant from the plaintiff. I have no hesitation in holding that the present suit by the plaintiff is a suit for the recovery of money within the meaning of this provision. Then the next part is that the defendant is entitled only to set-off for an ascertained sum of money.

The defendant's claim, as I have said before, is composed of two parts: one part is for rent and/or mesne profits and the other part is for the loss or damage of furniture. In my judgment, the claim of the defendant, in so far as it is for rent and/or mesne profits, is a claim for ascertained sum of money within the meaning of the provisions of the Code. But the claim for loss of or damage to the furniture, even though the defendant has put a value on it, is not a claim for an ascertained sum of money. I have been shown by Mr. Barwell the decision in *Edward Dalgleish* v. *Ramdin Singh* (1), where Chitty J. at page 172 makes the following observations:—

> "Ascertained does not mean undisputed. It is used in opposition to unliquidated damages, otherwise it would be in the hand of every plaintiff, by a bare denial, to defeat a claim of set-off."

Later on, at page 173, the Court makes the following observations:—

> "It is clear that the words "ascertained sum" in section 3 cannot mean only an admitted sum, for there would then be no right of set off in the large majority of cases. An ascertained sum means, according to the ordinary significance of the words, a sum of money of which the amount is fixed and known. Whether the plaintiffs admit it to be due or not is a question which has to be tried on the defendants' plea of set-off."

Those observations of the Court are not, in my view, in favour of Mr. Barwell's contention. In my opinion, claim for loss of or damages done to furniture is not a claim for an ascer-

(1) (1909) 14 C.W.N. 170.

CIVIL.

1951

D M. Jackson
v.
Clifford Hockley

*Mukharji, J.*

tained sum of money. The fact that the defendant has put a value on those damages and has tried to quantify such damage does not make the damage a claim for ascertained sum of money. If this argument of Mr. Barwell were right, then all claims for unliquidated damages could be converted into a claim for ascertained sum of money by the party claiming putting a value on such damages. That to my mind is an absurd contention. Therefore, in so far as part of the total claim of Rs. 4,587/- of the defendant, which is made the subject matter of a pleading of set-off relates to claim for loss or damages for furniture. I hold that it is not a competent subject for set-off within the meaning of Order 8 rule 6 of the Civil Procedure Code.

What remains of the defendant's claim for set-off is composed then of the claim for rents and/or mesne profits. Such claim is, in my view, a claim for ascertained sum of money within the meaning of Order 8 rule 6 of the Civil Procedure Code. This part of the claim amounts to a sum of Rs. 2,018/2/- being the rent for November and December 1946 and rent and/or mesne profits for January and February 1947 and 19 days of March 1947. First, I will therefore consider how far this claim of Rs. 2,018/2/- can be claimed by way of a set-off under the Code.

Sub-rule (2) of Order 8 rule 6 of the Civil Procedure Code provides that the written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect of both the original claim and of the set-off. This provision, in my opinion, means that the plea of set-off is to be treated as really a plaint and the court has to pronounce a final judgment not merely in respect of the plaint of the plaintiff but also upon the defendant's claim for set-off which is to be treated as a plaint. It follows from such provision that if the Court is obliged to pronounce a final judgment not only in respect of the original claim but also of the set-off then in the fitness of things, cases can and should arise where the final judgment on the original claim is one of dismissal and the final judgment on the claim for set-off is one of allowance. This is exactly what has happened in this case. Having regard to the language of sub-rule (2) and its

CIVIL.

1951.

D. M. Jackson
v.
Clifford Hockley.

*Mukharji, J.*

proper construction, it appears to me to be quite clear that the plaintiff in such a suit by giving up the claim in the plaint, cannot prevent the Court from pronouncing a final judgment on the set-off as pleaded in the written statement.

Sub-rule (3) is also indicative of the nature of set-off. It permits a written statement to be filed in answer to the claim for set-off. This, again, only shows that the set-off is to be treated as in the nature of a plaint in a cross suit and the defendant, in respect of that claim, is really to be regarded as the plaintiff. The other provisions are contained in rule 7 which requires the defendant to state the grounds of set-off separately and distinctly.

Order 20 rule 19 of the Civil Procedure Code is under Chapter headed 'judgment and decrees.' In discussing the various forms of judgments and decrees in this Chapter of the Civil Procedure Code, rule 19 prescribes what the decree shall state when set-off is allowed all that it says is that the defendant who has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant and shall be for the recovery of any sum which appears to be due to either party. Mr. Ghosh, Counsel for the plaintiff, on this basis has argued that when, therefore, there is no decree made in favour of the plaintiff, there is and can be no decree in favour of the defendant on the set-off. I have not been able to persuade myself to find the soundness of such argument. Order 20 rule 19 does not take away or detract anything from Order 8 rule 6. It only says that where there is a cross claim the dues of both the plaintiff and the defendant should be found and the decree shall state them and shall be for the recovery of the sum due to either party, so that in one decree there is the complete finding and adjudication. But in my judgment that does not mean that where the plaintiff fails to substantiate his claim at the trial and no decree can be made in the plaintiff's favour for any amount, the defendant is to be deprived of his claim for a set-off, by reason of such failure of the plaintiff. Order 20 rule 19 of the Code in such a case is satisfied by decreeing that the plaintiff's claim is dismissed and the defendant's claim is allowed.

CIVIL.

1951.

D. M. Jackson
v.
Clifford Hockley

*Mukharji, J.*

On an analysis of the various provisions of the Civil Procedure Code I hold that the defendant's plea satisfies the test of a set-off so far as it relates to his claim for rent and/or mesne profits. It appears that this particular point never arose for a decision in the Calcutta High Court. But it did arise in two cases—one at Allahabad and the other at Nagpur.

In the case of *Bansi Dhar Kunji Lal* v. *Lalta Prasad and another* (1), it is said by Bennet, J. at page 546:—

> "A set-off under Order 8 rule 6 may be pleaded although the claim of the plaintiff is denied, it is not merely a defence to the plaintiff's claim, and a decree may be granted under Order 20 rule 19, to the defendant although the suit of the plaintiff is dismissed by the decree. A set-off under Order 8 rule 6 is wider than a set-off at English law, but it is not so wide as a counter-claim."

I respectfully agree with the view expressed by Bennet, J. as above, Nimatullah, J. who was sitting with Bennet, J. in that case expressed his doubt on this point.

The other decision on the point in support of the view that I am taking is to be found in *Jamnadass Nagindass* v. *Beharilal Bisheswarlal* (2). This was a decision of a single Judge, Clarke J., who decided the case. At page 261 of the report Clarke J. makes the following observation:—

> "In the case of a genuine set-off, such as is contemplated by Order 8 rule 6, if the plaintiff's claim breaks down for any reason including a withdrawal, as in the present case, then the defendant would be entitled to have a set-off considered by the same court, and he could be given a decree for a set-off in the same suit."

The learned judge referred to the decision of the Allahabad High Court as well as the one in *R. S. Harf* v. *A. W. Grossor* (3), I respectfully agree with the views expressed by Clarke, J.

The case of *Baijnath Chauby* v. *Varajlal Moolji* (4), decided by the Court of Appeal consisting of McNair J. and

(1) [1934] A.I.R. All. 545.
(2) [1941] A.I.R. Nag. 258.
(3) (1905) 9 C.W.N. 748.
(4) (1944) 48 C.W.N. 481.

CIVIL.

1951.

D. M. Jackson
v.
Clifford Hockley.

*Mukharji, J.*

Gentle J. has been quoted before me. McNair J. at page 482 of the report only says:—

> "It is perhaps unfortunate that under the Rules of this Court and the Code of Civil Procedure for counter-claim is permissible."

Gentle J. however at page 483, after having said that the written statement in that case did not raise a set-off at all, made the observation by way of *obiter dictum*:—

> "But even so, assuming it is a set-off, in my view that is a defence and nothing more."

I do not think that solitary observation of Gentle J. was intended to mean anything more than what it says. It is true that a set-off is no more than a defence, but the problem is to find out the implication of such a defence. The question here that I have to decide is whether such a defence could result in a decree for the defendant alone as the plaintiff has withdrawn and given up his or her claim. There can of course be no set-off except by way of a defence. I do not think, that cryptic observation of Gentle J. at page 483 can be made extensible to and be an authority for the proposition for which Mr. Ghosh has argued. Incidentally, it must be observed here that McNair J. who was presiding in that Court of Appeal, did not express himself in the way that Gentle J. did. Then, the whole case in *Baijnath Chaubey* v. *Vanajlal Mooljt* (1) was not really concerned with this problem at all that I have to decide and it is most unfortunate that the Division Bench decision, *Harendra Nath Chaudhury* v. *Sourindra Nath Chaudhuri* (2) was not placed before McNair J. and Gentle J.

I, therefore, hold on this issue that the defendant is entitled to proceed with his claim on the set-off as pleaded in the written statement and answer the issue accordingly.

The next issue is: To what relief, if any, is the plaintiff entitled on the evidence as given in suit No. 865 of 1947 between the same parties and which I discussed in the judgment

(1) (1944) 48 C.W.N. 481.
(2) (1942) 46 C.W.N. 882.

which I delivered in that suit, I held that the rent for November and December 1946 is due and payable to the defendant by the plaintiff. I held further that the plaintiff has not paid any rent for these two months. I have already held in my judgment in the other suit that her tenancy terminated by the 31st December 1946. But she continued and did not leave until the 19th of March 1947. She did not pay any sum of money for her occupation from January to 19th March 1947. Really the plaintiff has no defence to this claim of the defendant. I therefore, hold that she is liable to pay at the rate of Rs. 437/8/- per month for January, February and part (being 19 days) of the month of March 1947, when she left voluntarily, as I have found in the other judgment, the total amount of the claim on this account, from November 1946 till the 19th of March 1947, at that rate comes to Rs. 2,018/2/-. There will, therefore, be a judgment for the sum of Rs. 2,018/2/- in favour of the defendant against the plaintiff.

Regarding the rest of the claim for a set-off in respect of the damage to defendant's furniture. I have already held that this is not a permissible claim and a competent subject matter for set-off under Order 8 rule 6. I therefore disallow the rest of the claim of the defendant.

Therefore, the judgment in this suit will be dismissal of the plaintiff's claims and judgment for a sum of Rs. 2,018/2/- in favour of the defendant against the plaintiff. The defendant is entitled to the cost of this suit. Certified for two Counsel.

There is a short point to which reference has been made In her claim, the plaintiff mentions under item (d), (4) in paragraph (4) of the plaint, one ceiling fan with regulator one of the articles stolen and under item 6 in the same portion of her plaint she mentions a towel stand. The ceiling fan with the regulator has been valued by the plaintiff at Rs 200/- and the towel stand along with the bath room fittings, shelves etc. have been valued at Rs. 100/-. I held in the other suit No. 865 of 1947 that the ceiling fan and the towel rack belonged to the plaintiff. Although the plaintiff in the suit has not asked in her plaint for the return of these articles, Mr. Barwell, on behalf of the

CIVIL.

1951.

D. M. Jackson v. Clifford Hockley.

*Mukharji, J.*

defendant on the basis of judgment in the other suit, offered to return these two articles but that offer has not been accepted on behalf of the plaintiff. The plaintiff has not, of course, given any evidence in this suit either to prove the value of the ceiling fan or of the towel rack. On the contrary, the counsel for the plaintiff has altogether given up the claim of the plaintiff in this suit. That being so, except the offer of Mr. Barwell being recorded, I make no further order.

*Mr. A. Ganguly*: Attorney for the Plaintiff.

*Messrs. P. C. Ghose & Co.*: Attorneys for the Defendant.

S.D.G. *Suit dismissed.*

## CIVIL REVISION.

CIVIL.

1951.

*June, 22.*

*Before The Hon'ble The Chief Justice and The Hon'ble Mr. Justice Das.*

### TAMLUK LOAN CO. LTD.

*v.*

### KEDAR NATH DAS AND OTHERS.*

*Civil Procedure Code (Act V of 1908)—Order 38 rule 8—If Court can investigate the question of title to money which may ultimately be payable under certain bills.*

*Civil Procedure Code—Section 115—High Court if can revise order passed by the Lower Court deciding a claim under Order 38 rule 8.*

Where certain bills are payable *prima facie* to the opposite parties Nos. 1 and 6 and the share of the latter is attached before judgment in a suit brought by the petitioner against opposite party No. 6 upon a promissory note, a claim under Order 38 rule 8 of the Civil Procedure Code is preferred by the opposite parties Nos. 1 to 5 upon the basis of a registered deed of partnership, the Court cannot investigate the question of title to the money which may be ultimately payable.

If a Court in deciding a claim goes beyond its jurisdiction and bases its decision on questions of title, the High Court can interfere in Revision.

Application by the Plaintiff.

* Civil Revision Case No. 489 of 1951 against an order of the 2nd Subordinate Judge, Midnapore.

CIVIL.

1951.

Tamluk Loan Co. Ltd. v. Kedar Nath Das.

Suit for recovery of certain sums of money due on two Promissory Notes.

The material facts will appear from the judgment.

*Mr. Manindra Krishna Ghose* for the Petitioner.

*Mr. Basanta Kumar Panda* for the Opposite Parties.

The judgment of the court was as follows:—

*June, 22.*

**C. N. Das, J.:**—This Rule was obtained by Plaintiff against an order of the learned Subordinate Judge, 2nd Court, Midnapore allowing a claim filed by Opposite Parties Nos. 1 to 6 under the provisions of Order 38, rule 8 of the Code of Civil Procedure

The plaintiff instituted a suit against Opposite Party No. 6 for recovery of certain sums of money due on two Promissory Notes. The plaintiff thereafter made an application for attachment before judgment of certain bills which stood in the names of Opposite Parties Nos. 1 and 6, attachment being prayed for in respect of the half share of Opposite Party No. 6. There upon Opposite Parties Nos. 1 to 5 appeared and preferred a claim. The allegation was that the bills were due to a partnership firm consisting of Opposite Parties Nos. 1 to 5 as partners. Opposite Party No. 6 was merely a working partner and was entitled only to 2 annas share of the profits.

The Subordinate Judge was of opinion that the money due on the bills should be regarded as held by the Government on account of the partners, namely Opposite Parties Nos. 1 to 5. In this view he allowed the claim.

Mr. Ghose appearing for the plaintiff petitioner has contended that the learned Subordinate Judge was not entitled to go into the question of title relating to the moneys payable under the bills and that as *prima facie* the bills stood in the names of Opposite Parties Nos. 1 and 6 the claim should have been disallowed.

On behalf of the contesting Opposite Parties Nos. 1 and 5 it was contended that the question of title could be gone into

CIVIL.

1951.

Tamluk Loan Co. Ltd. v. Kedar Nath Das.

*Das, J*

inasmuch as there was a registered partnership deed and the question before the court was simply as regards the effect of the partnership deed. It was also contended that this court had no jurisdiction to interfere into the matter.

Under the provisions of Order 21 rule 60 of the Code of Civil Procedure the Court in deciding a claim is required to consider whether the possession of the property was held by the judgment debtor or by some person in trust for him.

In the present case no question of trust arises. The bills stood in the names of Opposite Parties Nos. 1 and 6 and *prima facie* therefore the sums due under the bills would be payable to to Opposite Parties Nos. 1 and 6. The question of title to the bills cannot be investigated on a claim filed under Order 38 rule 8 read with Order 21 rule 15 of the Code of Civil Procedure. In this view the Subordinate Judge should not have gone into the question of title to the money which may be ultimately payable under the bills in question.

As regards the jurisdiction of this court it has been held in many cases in this court that if a court in deciding a claim goes beyond its jurisdiction and bases its decision on questions of title, this court can interfere in revision.

The result therefore is that the order complained of should be set aside and this rule made absolute with costs. The *ad interim* attachment will continue.

Let the counter-affidavit, filed in Court on June 21, 1951, be kept on the record.

**Harries, C.J.:**—I agree.

S.D.G.

*Rule made absolute*

## CIVIL REVISION.

*Before Mr. Justice T. J. Y. Roxburgh.*

DEBENDRA NATH SARKAR
*v.*
PARUL BALA GHOSE AND ANOTHER.*

CIVIL.

1951.

*February, 21.*

*West Bengal Premises Rent Control Act—Subtenant claiming right under—Decree against tenant—Possession obtained from tenant—Resistance by subtenant with respect to his occupation—Application by subtenant for forbidding execution—Propriety—Landlords application for police help to evict—Procedure.*

Although a subtenant is not entitled to make an application for forbidding the landlord from taking possession on the ground of his sublease, yet he is perfectly entitled to draw the attention of the Court that he has a claim under the Act to ask the Court not to give further assistance to the landlord in carrying out the Court's order in respect of the premises occupied by the subtenant but to insist that the landlord makes an application under Order 21 rule 97 of the Civil Procedure Code so that question of subtenant's rights may be determined.

Once a court is given to understand that there is a subtenant claiming a right under the Act, it should not go on providing the landlord with powerful weapons to force the subtenant out by dragging in police force.

Application by the Sub-tenant.

The material facts will appear from the judgment

*Mr. Paresh Nath Bhattacharya* for the Petitioner.

*Mr. Prokash Chandra Bhose* for the Opposite Party.

The judgment of the Court was as follows:—

*February, 21.*

**Roxburgh, J.:**—This Rule raises the question of the procedure to be adopted in the Calcutta Court of Small Causes in cases where landlords have obtained orders for recovery of possession of premises from their tenants and on seeking to carry out the orders are opposed by subtenants alleging that he

* Civil Revision Case No. 1138 of 1950 arising out of Suit No. 226 of 1949 of the Court of Small Causes, Calcutta, 2nd Bench, dated 5-8-1950.

CIVIL.

1951.

Debendra Nath Sarkar v. Parul Bala Ghose

*Roxburgh, J.*

had some right under the new West Bengal Premises Rent Control (Temporary Provisions) Act.

In previous cases disposed of by me the facts were that the tenants had applied to the Court even before the landlord had sought through court to obtain possession of the premises, and I have pointed out that such applications are premature. I have also pointed out that in my opinion the subtenant has a remedy under the provisions of Order 21, rules 97 to 100 of the Code of Civil Procedure which are made applicable to these proceedings of the Calcutta Court of Small Causes under section 48 of the Calcutta Small Causes Court Act.

In the present case, the landlord had obtained possession of some of the premises in pursuance of his order against his tenant but in respect of one room and kitchen held by O.P. No. 2 he was resisted by O.P. No. 2 and did not obtain possession. The O.P. No. 2 then went to court and stated that he had a sublease and prayed that the plaintiff be forbidden from taking possession of the room occupied by the applicant by execution of the decree and that the bailiff in charge of the execution of the writ of possession in connection therewith be directed accordingly. This prayer was eventually rejected on August 5 on the ground that the application by the subtenant was not maintainable. On August 18, the landlord applied to the Court for police help to obtain possession and the Court granted the prayer. The subtenant has now moved this court.

It cannot be said that in form there is anything wrong with the actual order passed by the learned Judge on August 5, because the subtenant was not entitled to make the application in the form in which he has made it. On the other hand, the subtenant I think is perfectly entitled to draw the attention of the Court to the fact that he has a claim under the new Rent Control Act to ask the Court not to give further assistance to the landlord in carrying out the Court's order in respect of the premises occupied by the subtenant, but to insist that the landlord makes an application under Order 21, rule 97 so that the question of the right of the subtenant may be properly determined by the Court. It does not seem to me right that when once a court is given to understand that there is a subtenant claiming a right

CIVIL.

1951.

Debendra Nath Sarkar v. Parul Bala Ghose

*Roxburgh, J.*

under the Act that the court should drag in the police and go on providing the landlord with further and more powerful weapons to force the subtenant out under the street, and leave him then to go to court under Order 21 rule 100. The order of August 18 directing that such assistance be given is quashed.

With these comments, the Rule is discharged but the court may bear this in mind if any further application is made by the landlord for forceful assistance to execute his order and if the landlord does not first make an application under Order 21, rule 97. I make no order as to costs.

S.D.G.

*Rule discharged, but order of August 18, is quashed.*

## ORIGINAL CIVIL.

*Before Mr. Justice D. N. Sinha.*

CIVIL.

1951.

*June, 12.*

DHARANI MOHAN ROY

*v.*

RAM AVATAR SHAW.*

*Calcutta Thika Tenancy Act (II of 1949)—Section 28—Condition precedent for application—Thika tenant—Definition in Section 2(5)—System—Tests for determination—Rent receipts—If prove system—Bustee tenant—If a thika tenant.*

To attract the rule of law in section 28 of the Thika Tenancy Act for rescinding a decree or order the applicant should satisfy, as a condition precedent, that the decree or order relates to a 'thika tenant.' He must come within the definition of such tenant in the Act and satisfy the conditions laid down in section 2(5).

Mere statement that a person is a 'thika tenant' or holds under a 'system' is not enough. Rent receipts showing 'ticca bustee' or Bharatia ticca tenant do not in any way prove a 'system.' Taking land and building structures thereon does not *ipso facto* make a person a thika tenant unless he proves the 'system.'

Tests to prove system were laid down.

The definition of Thika tenant in the Act and the definition of Bustee' in section 3(10) of the Calcutta Municipal Act do not make out any necessary connection between the two classes of tenants. Tenants

* Application in the matter of Original Civil Suit No. 584 of 1947.

CIVIL.

1951.

Dharani Mohan Roy v. Ram Avatar Shaw.

coming under the latter Act do not necessarily come within the definition in the former. It is not even a relevant fact for determining the character of tenancy under the Thika Tenancy Act.

Application by the Defendant for relief under the Thika Tenancy Act.

The facts will appear from the judgment.

*Mr. Bankim Dutta* for the Applicant.

*Mr. M. N. Banerji* for the Respondent.

The judgment of the Court was as follows:—

*June, 12.*

**D. N. Sinha, J.:**—This is an application under section 28 of the Thika Tenancy Act, II of 1949, for an order that the decree dated the 1st September 1948 be rescinded, set aside or varied, and the proceedings transferred to the Controller appointed under that Act. As a consequential relief, it is asked that the plaintiff be restrained from executing the said decree.

The facts of this case are briefly as follows. The plaintiff is the owner of two plots of land, described as 'bustees' situated in Calcutta, being municipal premises Nos. 75 and 77 Kailash Bose Street. The defendant states that he is a tenant in respect of a plot of land being part of premises No. 77, Kailash Bose Street, and two plots of land, being parts of premises No. 75, Kailash Bose Street. It is admitted that the tenancy in respect of the two plots in premises No. 75 Kailash Bose Street, commenced in 1942. There is some dispute as to the commencement of the tenancy in respect of premises No. 77, Kailash Bose Street. According to the defendant, the tenancy commenced about 50 years ago. According to the plaintiff it commenced from 1939, when the defendant surrendered the previous tenancy (which had commenced in 1922) consisting of a larger plot and a fresh tenancy was granted of a smaller plot. Therefore, it all depends upon how one looks at it; whether to consider the present tenancy as a continuous one from 1922, or as a fresh tenancy from 1939. In my opinion, nothing really turns upon this, it being quite immaterial as to whether this particular tenancy commenced in 1922 or 1939.

The next question is as to the structures built on the lands. According to the defendant, he has erected and/or built on the said plots, structures for his residential as well as business purposes at a total cost of about Rs. 22,500/-. This is not admitted by the plaintiff. The denial is rather in general terms save and except that it is pointed out that the defendant purchased some huts in premises No. 75, Kailash Bose Street from the previous tenants, that he asked for permission to build a mudkottah thereon but permission was refused. However, on the materials before me I would be unable, without further evidence, to come to any definite finding as to whether the defendant did build any structure on the lands or not. In the view I have taken, it is not necessary for the purposes of this application to come to any such finding. I shall proceed on the footing that the defendant was a monthly tenant in respect of certain lands and built some structures upon it. The point for decision is as to whether this constitutes the defendant, a 'Thika tenant', so as to enable him to enjoy the benefits conferred by the 'Thika Tenancy Act.' Before I deal with the legal aspect of the matter, I will state a few more facts.

On or about the 4th March, 1947, the plaintiff instituted this suit against the defendant for ejectment from all the three plots. The defendant entered appearance. An application by the plaintiff under Ch. XIIIA for summary judgment was unsuccessful and the defendant was allowed to file his written statement. The only defence taken that the notice to quit was not valid, as there was a verbal agreement to give one calender month's notice. The suit came up for hearing before Clough J. and on the 1st September 1948 upon hearing the advocates for the parties, the learned Judge decreed the suit, but ordered stay of execution for five months. On or about the 28th September 1948, the defendant instituted a suit, being suit No. 3461 of 1948 (*Ram Avatar Shaw* v. *Dharani Mohan Roy*) for setting aside the decree, for a declaration that the decree was not binding upon him, for a permanent injunction restraining the landlord from executing his decree and for other reliefs.

Sometime in January 1949, the plaintiff commenced execution proceedings.

The Thika Tenancy Act, came into operation, sometime in February 1949. In 1951, the defendant made an application

CIVIL.

1951.

Dharani Mohan Roy v. Ram Avatar Shaw.

*Sinha, J.*

for an injunction, in suit No. 3461 of 1948 restraining execution of the decree and also filed objections to the application for execution on the ground that the decree could not be executed against the defendant, who was a 'Thika tenant', entitled to relief under the Thika Tenancy Act. The two applications came up before me on the 25th April 1951 when I dismissed the application for an injunction and made an order for execution but stayed the operation of it for 7 days. The defendant has now made this application under section 28 of the Thika Tenancy Act and the execution has been temporarily stayed.

Section 28 of the Thika Tenancy Act runs as follows:

"28. Where any decree or order for the recovery of possession of any holding from a thika tenant has been made before the date of commencement of this Act but the possession of such holding has not been recovered from the thika tenant by the execution of such decree or order, the Court by which the decree or order was made may, if it is of opinion, that the decree or order is not in conformity with any provision of this Act other than sub-section (1) of section 5 or section 27, rescind or vary the decree or order in such manner as the Court may think fit for the purpose of giving effect to such provision and a decree or order so varied by any court shall be transferred by such Court to the Controller for execution under this Act as if it were an order made under and in accordance with the provisions of this Act."

It will be observed that the condition precedent for the application of this rule of law is that the decree or order should relate to a 'Thika tenant.' I have therefore to determine whether the applicant is a 'Thika tenant' as defined by the Act. In *Ballabhram Badrinarayan Ltd.* v. *Devi Prosad Soni Kettry* (1)

Mukharji J. has held as follows:

"The evidence necessary to establish that a tenant is a Thica tenant within the meaning of the Act must (1) first prove the terms of the particular tenancy of the defendant

(1) Unreported judgment of *P. B. Mukharji, J.* in Original Civil Suit No. 3397 of 1948.

and that is clear from the word 'Holds' in section 2(5) of the Statute, (2) secondly a system within the meaning of section 2(5) of the Calcutta Thica Tenancy Act, 1949, and which must be either 'the commonly known system' mentioned therein or 'any other like system' and (3) thirdly that his own terms of tenancy correspond with such system. These are the three essential considerations from the point of view of evidence."

A 'Thika tenant' has been defined by the Act, [Section 2(5)] and to come under the mischief of the definition, the tenant must hold under the system commonly known as "thika," "thika masik utbandi", "thika masik", "thika bastu" or any other like system, or recorded in any record-of-rights as holding under the title "dakhal basatkar" or other like appellation. If we analyse the provisions of section 2(5) of the Act we find that a tenant in order to be a 'Thika tenant' as defined by the Act must satisfy the following conditions:—

(1) The tenant must be a tenant of the 'land.' If he is a tenant of a structure then if the structure satisfies the defintion of "Premises" as defined by the West Bengal Premises Rent Control Act 1950, he will come under the mischief of that Act.

(2) On that 'land' the tenant must have himself built a structure for a residential, manufacturing or business purpose. If the structure has been built by some one else or purchased by the tenant, then he cannot claim the benefit of the Act. *Haran Chandra Dey* v. *Sm. Charu Bala Dassi* (1).

(3) The tenant must hold the tenancy under a system commonly known as "thika", "thika masik utbandi", "thika masik", "thika bastu" or any other like system. It might be held under a written lease or otherwise.

(4) The tenant is a 'thika tenant', if he has been recorded in any record-of-rights as holding, under the title "dakhal basatkar" or other like appellation.

(5) The tenant must be, or but for a special contract would be liable to pay rent at a monthly or any other periodical rate.

(1) (1948) 53 C.W.N. 555.

CIVIL.

1951.

Dharani Mohan Roy v. Ram Avatar Shaw.

*Sinha, J.*

(6) A 'thika tenant' includes the successors-in-interest of a person who satisfied the definition of a 'Thika tenant.'

It will be observed that the 'Thika Tenancy Act' makes no mention of a 'Bustee', not to speak of defining that term. A 'bustee' is thus defined by the Calcutta Municipal Act:—

"Section 3(10)—'*Bustee*' means an area containing land occupied by, or for the purposes of, any collection of huts—

(a) standing on a plot of land not less than ten cottahs in area and bearing one number in the assessment book, or

(b) standing on two or more plots of land which are adjacent to one another and exceed in the aggregate one bigha in area."

Considering the two definitions side by side, we find that there is no necessary connection between the two at all. A person might be a tenant of a piece of land and build a structure thereon which is not a hut, and yet (if all other terms are complied with) be a 'thika tenant.' He will certainly not be a "Bustee" tenant. There might be a plot of land with a single hut, and (if all other terms are complied with) the tenant may be a 'Thika tenant' but not a 'Bustee' tenant.

But the tenant in a 'Bustee' may be a 'Thika tenant,' provided he complies with all the terms of section 2(5) of the 'Thika Tenancy Act,' in the same way as a tenant not belonging to a 'Bustee' might claim to be a 'Thika tenant.' There is nothing in the 'Thika Tenancy Act' to show that there was any particular intention to benefit the dwellers of 'bustees' in Calcutta or its suburbs.

Therefore, it is not at all sufficient to show that a person's tenancy relates to land or structures in a 'Bustee.' To my mind, it is not even a relevant fact claiming our consideration.

CIVIL.

1951.

Dharani Mohan Roy
v.
Ram Avatar Shaw.

*Sinha, J.*

Let me now refer back to the analysis, I have made of section 2(5) of the 'Thika Tenancy Act.' As regards items (1) and (2), there does not seem to be much difficulty. It might even be said, that tenants in 'Bustees' do generally become tenants of the land and build temporary structures thereon. The real difficulty however arises when we consider item (3). The tenant, having proved that his tenancy consists of 'land' and that he has built structures thereon for any of the specified purposes, is next faced with the task of proving that he holds under 'System,' commonly known as 'Thika,' 'Thika masik utbandi' 'Thika masik,' 'Thika bastu' or any other like system. A 'system' is difficult to define. Mukharji J. in the case cited above, says that the essential predicate of a system was uniformity comprehending a plurality of situations from which could be deduced an invariable method. In my opinion, to prove that a tenancy comes under the category of a particular 'system,' the tenant must prove the following things:—

(1) The terms and conditions of his tenancy.

(2) That a large number of tenants in a particular locality hold under such terms and conditions.

(3) That the terms and conditions of such tenancies are fixed, invariable and capable of ascertainment.

(4) That such tenancies are not isolated either in point of time or space. That is to say, a large body of persons must have been holding lands as tenants on the same or closely similar terms, for a sufficient length of time.

(5) That the particular kind of tenancy, with its characteristic terms and conditions, has come to be associated in the mind of the public with a particular appellation.

(6) That the particular tenancy in question can and does bear one (or more) of the appellations specifically mentioned in section 2(5) of the Act.

CIVIL.

1951.

Dharani Mohan Roy v. Ram Avatar Shaw.

*Sinha, J.*

(7) If it bears any other appellation, then it must be shown that the terms and conditions are closely similar to the terms and conditions of one of the 'systems' named. To prove this, every term and condition of both the 'systems' must be known and stated; otherwise, a comparison is impossible.

It follows that a mere statement to the effect that a person is a 'Thika tenant' or holds land under a 'system,' is not enough. Such statements are not at all self-evident or self-explanatory. Every judicial decision constitutes a syllogism; its major premise is of course a legal rule and cannot be anything else, its minor is a set of facts. Unless the facts are fully known the legal rule cannot be applied. Unless the facts that constitute a tenant, a 'Thika tenant' under the Thika Tenancy Act are known, the major premise does not arise at all. The petitioner states that he is a tenant in respect of three plots of land, upon which he has built some structures for residential as well as business purposes. He then goes on to say that he held these lands under the plaintiff and/or his predecessors-in-title "In accordance with the system commonly known as "Thika," 'Thika Masik," "Thika Basti" or other like system." In other words, he has merely repeated the wordings of the section in the Act. The tenancy must normally be according to one system, it cannot be according to all the systems named. The petitioner speaks of a system called "Thika Basti," but no such system is mentioned in the section. If he holds under any of the named systems, he has not either stated, what are the characteristics of that system so that a comparison may be made with the terms of his own tenancy. In other words, he has not complied with the tests I have mentioned above, for proving a 'System.'

The petitioner relies on his rent receipts. The English Rent Receipts are headed as "Rent Receipt for House/Ticca Bustee land." The Bengali Receipts are headed as "Bharatia/Ticca tenant." To my mind these receipts prove nothing. It may be that the word 'Ticca' appears in the receipts but how do I know that there is any system in Calcutta commonly known as 'Ticca' and that this tenancy belongs to such a system. The English Receipts call it 'Ticca Bustee' and this is also what

CIVIL.

1951.

Dharani Mohan Roy v. Ram Avatar Shaw.

*Sinha, J.*

the petitioner himself claims. As I have said, no such system known as 'Thika Bastee' is mentioned in the Act. If the petitioner claims to hold under a system called 'Thika Bastee,' then he will have to prove that the system is analogous to the other systems named in the Act and this cannot be done, unless the characteristic features of all such systems are known. It must be noted, that the systems are not defined in the Act. No reference is to be found in any text book or judicial decision, as to the existence of such systems in the city of Calcutta or as to their characteristic features. Such systems are known to exist in the mofussil and are in the nature of agricultural tenancies. The only other evidence put forward consists of two affidavits. The first one is affirmed by one Mahabir Shaw, who says that he is a tenant of two open plots of lands at 245A, Upper Circular Road, Calcutta. He has lived there for 20 years, pays a monthly rent, and has built structures on the land for purposes of residence, and business. He then proceeds to say that he had always held and still holds his plots "under a system known as 'Thika Masik' 'Thika Basti,' or a similar system;" which in his opinion at all material times prevailed and still prevails in all areas under the ordinary original civil jurisdiction of this Court. This evidence does not satisfy the tests I have mentioned above. This man also does not state the characteristics of any such system. He merely repeats the language of the section and even so, makes a departure inasmuch as he mentions "Thika Basti" which is not mentioned in the Act. If he holds under two named systems, one unnamed system and various systems of similar nature I am left with no real information at all, unless I know what are the characteristic features of all such systems. On the face of it, it seems passing strange that a man's tenancy could simultaneously belong to a number of named and unnamed systems of tenancy. The other affidavit is by Lachmiram Kalwar, a relation of the defendant, who is a tenant of an open plot of land at 75, Kailash Bose Street, paying a monthly rent. His parents built structures for residential and business purposes. He also repeats the same formula, "I have always held and still hold the said plot of land as a thika tenant under a system known as "Thika Masik," "Thika Basti" or a similar system which at all material times prevailed and still prevails in my locality as well as in other areas at Calcutta within the ordinary original civil jurisdiction." For reasons which I need not re-

CIVIL.

1951.

Dharani Mohan Roy v. Ram Avatar Shaw.

*Sinha, J.*

peat, I cannot accept this evidence as proving anything at all. Even if I were to believe that these two persons were holding tenancies of the description mentioned in the Act, the evidence of only two people cannot prove a system in the whole city of Calcutta or even in any particular Bustee. In *Ballabhram Badrinarayan* v. *Devi Prosad Soni Khettry* (1), elaborate evidence was gone into, and it was found that different systems of tenancies existed within the very same bustee and that 'Thica tenancy' does not prevail in Calcutta but is a practice which may be found outside Calcutta.

In *Murari Mohan Mukherjee* v. *Prokash Chandra Chatterjee* (2), the demised land was situated in Bowbazar Street and the tenant held under a lease for ten years with leave to erect structures. It was held that in the absence of evidence showing that any such 'system' as mentioned in section 2(5) prevailed in the locality, the tenant could not be called a 'Thika tenant.'

In *Suraj Jan Bibee* v. *Banku Behary Saha* (3), the agreement of tenancy contained the words "From this day I shall be regarded as merely a thika tenant at will (monthly tenant) in respect of the said land." It was held that all thika tenants were not entitled to relief under the Thika tenancy ordinance, and that it was necessary to prove that the tenant held under a 'system' mentioned therein. A monthly tenant was not necessarily a thika tenant.

In *Shaikh Mohammed* v. *Baijnath* (4), Mukharji J. held that when a tenant took a vacant land and then built structures thereon, he did not *ipso facto* become a thika tenant under the Calcutta Thica Tenancy Act. If that were so, every lessee under an ordinary building lease would become a thika tenant, but neither the express language nor the intention of the Act justified such a conclusion. This decision was upheld by the Appeal Court in *Baijnath Bajoria* v. *Sk. Md. Mateen* (5), where Harries C.J. pointed out that, merely to show that a tenant held under

(1) Unreported judgment of *P. B. Mukharji, J.* in Original Civil Suit No. 3397 of 1948.

(2) (1949) 53 C.W.N. 646

(3) (1949) 54 C.W.N 281

(4) (1949) 54 C.W.N. 287.

(5) (1950) 55 C.W.N. 277.

a written agreement at a monthly rent and that he had erected structures was merely to show part of what was necessary to constitute him a thika tenant. He must further show that he holds the land under one of those systems.

In *Ballabhram Badrinarayan* v. *Debi Prosad Soni Khettry* (1), Mukharji J. said as follows: "The question of Thica tenancy is constantly coming up before the Courts. Time has come to express this Court's views on the species of tenancy contemplated by the Statute and to say that this species is unknown in Calcutta as a commonly known system or any other system. I do not know of any case succeeding in this Court or establishing a Thika tenancy within the meaning of the Calcutta Thika Tenancy Act, 1949."

Mr. Dutt, appearing for the petitioner, has strongly criticised this finding. According to him, the learned Judge should have confined himself to the facts of the case before him and not made a general observation to the effect that the system was unknown in Calcutta. According to Mr. Dutt, the system does exist and may yet be proved. So far as I am concerned, I need not go so far as to hold that it can never be proved. To take an analogy, no body has yet been able to prove that a mechanical contrivance, producing perpetual motion cannot be made, and yet nobody has ever succeeded in making one. Thus, it is sufficient to observe that nobody has ever proved the existence of 'Thika tenancy' in Calcutta, and the petitioner has proved no exception. Whether anybody will ever prove it in future is another matter altogether. In *Messrs. Karnani Bros.* v. *Matilal Nath* (2), Harries C.J., said as follows:

> "To be a Thika tenant within the meaning of the Thika Tenancy Act the tenant must be a person holding under a system commonly known as 'Thika', 'thika masik utbandi,' 'thika masik,' 'thika Bastu' or under any other like system . . . . . there was no evidence as to what these systems were or whether they even existed . . . . . what this system is I am unable to say and upto the present nobody has been able to adduce satisfactory evidence showing what the system is. Mr. Choudhury who has appeared for the appellants, has suggested that we

(1) Unreported Judgment of *P. B. Mukharji, J.* in Original Civil Suit No. 3397 of 1948

(2) Unreported—Appeal from Original Civil No. 18 of 1950.

CIVIL.
1951.
Dharani Mohan Roy
v.
Ram Avatar Shaw.
*Sinha, J.*

should infer that the tenants held under this system from the terms of the Contract. But how can we make such an inference when we do not know what the system is? We have not the slightest idea what this system is. That being so, it is quite impossible for Mr. Chaudhury to contend that his clients held under such a system."

In this case also, I am not told as to what the systems are and I am not satisfied that the petitioner holds under any such system. The petitioner has failed to prove that he is a 'Thika tenant' as defined by the Thika Tenancy Act and this application must be dismissed with cost. The interim order is vacated.

*Mr. B. N. Basu*: Solicitor for the Petitioner.

*Messrs. Nahar & Dutta*: Solicitors for the Respondent.

S.D.G. *Application dismissed.*

CIVIL.
1951.
*June, 26.*

## APPELLATE CIVIL.

*Before Mr. Justice P. N. Mookerjee.*

## JATINDRA NATH SHEE
*v.*
## MALAI RAM SHAW.*

*Transfer of Property Act (IV of 1882)—Section 106—Notice under —Rules for construing notice—Demanding possession 'at the end of a month of tenancy which would expire next after 15 days from the receipt of the notice'—If sufficient and valid in law.*

*West Bengal Premises Rent Control Act (XVII of 1950)—Sections 14, 81(5) —If retrospective—Applicability of the sections.*

A liberal construction ought to be put upon a notice to quit and it should not be defeated by inaccuracies either in the description of the premises or the name of the tenant or the date of expiry, the test of its sufficiency would be not what it would mean to a stranger but what it would mean to the tenant presumably conversant with the facts and circumstances nor should it be construed to find fault with it.

Appeal from Appellate Decree No. 380 of 1948 against the decree of Sri G. P. Mukherjee, 2nd Subordinate Judge, Howrah in Title Appeal No. 133 of 1947.

CIVIL.

1951.

Jatindra Nath Shee
v.
Malai Ram Shaw.

A notice demanding possession "with the end of July 1945 or at the end of a month of your tenancy which would expire next after fifteen days from the receipt of this notice" is not vague nor insufficient nor bad in law.

Section 14 of the West Bengal Premises Rent Control Act 1950 is not retrospective in so far as it confers benefit upon the tenant except to the extent that it is attracted by section 18(5) of this Act. The latter section is only retrospective only to this extent that it applies to a pending action for ejectment only of such type where no decree would be passed except on the ground of default in payment of arrears of rent or on the ground of *ipso facto* determination.

Case laws discussed.

Appeal by the Defendant.

Suit for ejectment, arrears of rent and damages.

The material facts will appear from the judgment.

*Messrs. Apurbadhan Mukherjee and Sachindra Chander Das Gupta* for the Appellant.

*Messrs. Nani Coomar Chakravorti and Chandra Kumar Chatterjee* for the Respondent.

The judgment of the Court was as follows:—

*June, 26.*

**P. N. Mookerjee, J.:**—In this appeal by the defendant which arises out of a suit for ejectment, arrears of rent and damages, two questions have been raised by Mr. Mukherji appearing for the defendant appellant. The first is whether the defendant appellant is entitled to any benefit under either section 18(5) or section 14 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 and the second question relates to the legality, validity and sufficiency of the notice to quit which, according to the plaintiff respondent and the courts below, determined the tenancy in the present case.

The material facts as found by the courts below are not now in dispute and they are as follows:—

The defendant was a monthly tenant under the plaintiff in respect of the two rooms in Suit in holding No. 172, Panchanan-

CIVIL.

1951.

Jatindra Nath Shee
v.
Malai Ram Shaw.

P. N. Mookerjee, J.

tala Road, Howrah, at a rental of Rs. 12/- per month. There was default in payment of rent and thereupon the plaintiff instituted a suit for recovery of over nine months' rent and therein the plaintiff obtained a decree against the defendant. Even after the institution of the said suit the default in the payment of rent continued and accordingly the plaintiff served a notice to quit on the defendant on the 19th July, 1945 and brought the present suit for ejectment and the other reliefs mentioned above, on the 29th September 1945 after obtaining the necessary permission from the Rent Controller under the law then in force.

Both the courts below have decreed the plaintiff's suit holding *inter alia* that the notice to quit [copies whereof are Exhibits 2 and 3 (a)] was legal, valid and sufficient and that it had been properly served upon the defendant and had duly terminated his tenancy. In this appeal against the said decree for ejectment Mr. Mukherji has, as stated above raised only two contentions which have been mentioned above.

Admittedly, the suit was instituted on the 29th September 1945. At that time the Bengal House Rent Control Order, 1942 was in force at Howrah. So far therefore, as the recent Rent Laws are concerned, this case would in my opinion, be governed by the provisions of the said Rent Control Order, 1942, unless there be something in the subsequent Rent Laws applicable to the present case. Mr. Mukherji has argued that sections 14 and 18 (5) of the Rent Act of 1950 would be applicable to the present case. His argument is that the said sections are retrospective and apply to the present case. In my opinion, this argument cannot be accepted. Section 14, so far as it confers benefit upon the tenant is not retrospective except to the extent that it is attracted by section 18(5). Unless therefore, section 18(5) applies to the present case section 14 cannot be of any assistance to the appellant.

Dealing with this part of the case Mr. Mukherji urges that section 18(5) is expressly retrospective and applies to pending cases. The difficulty however is that the said section is retrospective only to this extent that *it applies to a pending action for ejectment only when that action is of such a type that no decree for ejectment would be passed therein except on the*

*ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, or after the recent amendment of the said section 18(5) on the ground that the interest of the tenant in the premises in question has been ipso facto determined under the provisions of sub-section 3 of section 12 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948.* The portion italicised above indicates that, in order that section 18(5) may apply the case must be one where the decree for ejectment can be passed only on the ground of default in payment of arrears of rent or *ipso facto* on determination of the tenancy under the Act of 1948. The present case does not, in my opinion, fall within that description. The suit in the present instance was as I have said above, instituted at a time when the Rent Control Order, 1942, was in force. There is nothing in the Act of 1948 which makes its provisions applicable to pending actions and therefore, no part of the Act of 1948 can apply to the present case. See the case of *Monomohan Moitra* v. *Gobinda Das Chowdhury* (1). If therefore any decree for ejectment can be made in the present case it will be made not on any ground under the 1948 Act, but on grounds outside the same. Section 18(5) of the 1950 Act whether before or after amendment cannot therefore be invoked by the appellant in his aid. This view is amply supported by the Bench decision of this court in the case of *Jay Kumar Sarkar* v. *S. K. Chaudhuri* (2). I hold therefore, that section 18(5) of the Act of 1950 is not applicable to the present case and that accordingly, section 14 also cannot apply.

Even assuming that section 14 is retrospective by itself and applies to pending cases independently of section 18(5), the position will not be altered in the present case as apart from anything else, the defendant having made defaults on more than three occasions within a period of 18 months in the payment of two months' rent must be held to have disentitled himself to the benefits if otherwise available, of section 14 under the proviso thereof. This follows from the Bench decision of this court in the case of *Sreenarain Mansingka* v. *Amarnath Mishra* (3), which has held that for purposes of the proviso to section 14

(1) (1950) 55 C.W.N. 6.
(2) (1951) 55 C.W.N. 471.
(3) (1950) 87 C.L.J. 4.

CIVIL.

1951.

Jatindra Nath Shee v. Malai Ram Shaw.

*P. N. Mookerjee, J.*

pre-Act defaults are relevant and have to be taken into account and sitting singly, I consider myself bound by that decision.

In expressing myself as above I have not overlooked the fact that the Bench decision, referred to above, was pronounced in an original side Appeal of this Court. To me, however that appears to be of no consequence as notwithstanding opinions to the contrary sometimes expressed I feel no hesitation in holding that a Bench decision pronounced on either side of this court is nevertheless a Bench decision of this court and is as such equally binding upon all its Judges sitting singly. I hold therefore, that I am bound by the decision in *Sreenarain Mansingka* v. *Amarnath Mishra* (1) and must accordingly reject the appellants' claim to protection under section 14 of the Act of 1950.

The first contention of Mr. Mukherji must therefore fail and is overruled.

The contention regarding the notice to quit raises a question of some nicety and considerable importance. The relevant portion in the notice to quit is in these terms:

"Notice is hereby given to you to vacate and deliver up possession of the said two rooms with the end of 31st July, 1945 or at the end of a month of your tenancy which would expire next after fifteen days from the receipt of this notice."

Mr. Mukherji contends that the notice is illegal, invalid and insufficient. In developing this contention Mr. Mukherji has advanced the following three arguments namely:—(i) that the notice having admittedly been served on 19th July 1945 it is illegal, invalid and insufficient so far as it demands possession with the end of 31st July 1945 as in such circumstances it cannot be a fifteen days' notice to quit; (ii) that the notice so far as it demands possession at the end of a month of your tenancy which would expire next after 15 days from the receipt of this notice is also bad, invalid and insufficient as it is vague and indefinite and therefore inappropriate and ineffective in law to terminate the tenancy; and (iii) that the notice is also bad and invalid as the demand for possession, contained in it, being in the alter-

(1) (1950) 87 C.L.J. 41

native renders the notice bad for uncertainty and therefore void or at least, ineffective in law to determine the tenancy.

CIVIL.

1951.

Jatindra Nath Shee v. Malai Ram Shaw.

P. N. Mookerjee, J

Argument (i) noted above has no answer and must be accepted, but that would not be sufficient to invalidate the notice to quit unless therefore either of the other two arguments (ii) and (iii) of Mr. Mukherji noted above, can be accepted the contention raised on the notice to quit must fail.

In judging the soundness of the said two arguments (ii) and (iii) it has to be remembered, at the outset, that the relevancy and applicability of English decisions on this branch of the law to Indian conditions has been expressly recognised by the Judicial Committee in the case of *Harihar Banerji* v. *Ramsashi Roy* (1). It is also necessary to recall in this connection that in this country and in England the rule is firmly established that the construction of notices to quit should be such as to 'rationally interpret' lame and inaccurate notices and make them sensible where the recipient cannot have been misled as to the intention of the giver. See *Doe d. Williams* v. *Smith* (2) and *Wride* v. *Dyer* (3), which were cited with approval in the above Privy Council decision that a liberal construction ought to be put upon a notice to quit and it should not be defeated by inaccuracies either in the description of the premises [See *Doe d. Cox* v. *Roe* (4), *Shama Charn* v. *Wooma Charn* (5), *Giridhari* v. *Purnendu* (6) and *Harihar Banerji* v. *Ramsashi Roy* (1), referred to above] or the name of the tenant [See *Doe* v. *Spiller* (7)] the principle of which decision must be held to be applicable in India in view of the observation made in *Harihar* v. *Ramsashi Roy* (1)) or the date of expiry of the notice [See *Sidebotham* v. *Holland* (8), *Doe d. Williams* v. *Smith* (2), *W. Davis Ltd.* v. *Huntley* (9), *Gnanaprakasan* v. *Vaz* (10), *Tika Ram* v. *Deoji*

(1) (1918) L.R. 45 I.A. 222.
(2) (1836) 5 Ad and El. 350.
(3) [1900] 1 Q.B. 25.
(4) [1802] 4 Esp. 185.
(5) (1898) I.L.R. 25 Calc. 36.
(6) (1938) 68 C.L.J. 484.
(7) (1807) 6 Esp. 70.
(8) [1895] 1 Q.B. 378.
(9) [1947] 1 All. E.R. 246.
(10) (1931) 60 M.L.J. 293.

CIVIL.

1951.

Jatindra Nath Shee v. Malai Ram Shaw.

*P. N. Mookerjee, J.*

*Maharaj* (1)] and further that the test of its sufficiency would be not what it would mean to a stranger ignorant of all facts and circumstances of the tenancy in question but what it would mean to the tenant presumably conversant with all those facts and circumstances. See *Harihar Banerji* v. *Ramsashi Roy* (2)]. In addition to the above, the rule is also well established that notices to quit are to be construed not with a desire to find faults with them which would render them defective, but they are to be construed *ut res magis valeat quam pereat* [See *Harihar Banerji* v. *Ramsashi Roy* (2)].

The legality, validity and sufficiency of a notice to quit have to be examined in the light of the above rules, the soundness of which cannot now be questioned, and, as a result of such examination in the present case, I have unhesitatingly come to the conclusion that arguments (ii) and (iii) of Mr. Mukherji are unsound and cannot be accepted. In my opinion the notice to quit served in the present cases, is neither vague nor insufficient nor bad in law and the defendant's tenancy has been duly determined thereby.

Mr. Chakravarti appearing for the plaintiff respondent has drawn my attention to the English decisions *Doe d. Digby* v. *Steel* (3), *Doe d. Crat* v. *Timothy* (4), *Doe d. Bake* v. *Woombrith* (5), which held, in effect, that a notice to quit demanding possession at the end of the anniversary of the commencement of the tenancy is not vague or insufficient or invalid. The leading cases of *Sidebotham* v. *Holland* (6), confirms that view. To my mind the principle underlying these decisions is sound and ought to be applied in this country. Argument (ii) of Mr. Mukherji must, therefore fail.

Reference may now be made to the following passage occurring in Mulla's Transfer of Property Act, third edition at page 653 which runs thus:—"It is usual after mentioning the date of the anniversary of the tenancy to add in the alternative some general words as at the end of the year of the tenancy

(1) [1934] All. L.J. 674.
(2) (1918) L.R. 45 I.A. 222.
(3) (1811) 170 E.R. 1324.
(4) (1847) 175 E.R. 145.
(5) (1811) 170 E.R. 1251.
(6) [1895] 1 Q.B. 578.

which will expire next after the end of one-half year from the date of the service of this notice." That passage (which first appeared in the 1st Edition of the book in 1933 and was reproduced verbatim without any changes in the two later editions of the book) suggests that demand for possession in the alternative form is perfectly valid and well recognised in law. The English cases of *Doe d. Williams* v. *Smith* (1), cited above and *Doe d. Digby* v. *Steel* (2) and *Crat* v. *Miller* (3), clearly support the validity of such demand. There is also nothing either in principle or in the authorities which runs counter to this suggestion of the learned author and accordingly, I am inclined to accept the same. Tested in this back ground, argument (iii) of Mr. Mukherji must also fail.

It further appears that question, now before me, has also been judicially considered in other parts of this country. There are at least two judicial decisions, *Sankar Ram* v. *Tulsi Bhagat* (4) and *Ganga Prasad* v. *Prem Kumar Kapli* (5), which have a direct bearing on that question. These two decisions in my opinion clearly support the view that the notice to quit in the present case is good, valid and sufficient and as I have already indicated above, I have no doubt in my mind that view is correct and ought to prevail.

I would accordingly reject Mr. Mukharji's second contention and hold that the notice to quit served in the present case is neither bad nor invalid nor insufficient and that it had duly determined the defendant's tenancy.

The result, therefore is that all the contentions raised by Mr. Mukherji fail and this appeal is dismissed. Having regard however to all the circumstances I make no order as to costs in this appeal.

Leave to appeal under clause 15 of the letters patent is asked for and is granted.

S.D.G. *Appeal dismissed.*

(1) (1836) 5 Ad. and El. 350.
(2) (1811) 170 E.R. 1324.
(3) (1947) 2 All. E.R. 45.
(4) [1921] A.I.R. Pat. 307.
(5) [1949] A.I.R. All. 173.

*Before Mr. Justice P. N. Mookerjee.*

CIVIL.

1951.

*July, 11.*

MURALIDHAR AGARWALLA AND OTHERS

*v.*

RUPENDRA NATH MITTER AND OTHERS.*

*Transfer of Property Act (IV of 1882), section 6 clause (e)—Right to recover damages or compensation transferred along with the transfer of a property—Valid assignment and not hit by section 6, clause (e).*

*Suit for recovery of damages for use and occupation or alternatively for mesne profits, if maintainable—Prima facie proof of title—Prior possession under certain circumstances, sufficient prima facie evidence of title.*

When a property is transferred and along with it a right to recover damages or compensation in respect of that property, the assignment of this right is a valid assignment and is not hit by clause (e) of section 6 of the Transfer of Property Act.

In a suit for recovery of damages for use and occupation or alternatively, for mesne profits, the plaintiff can succeed on *prima facie* proof of title and prior possession may under certain circumstances be sufficient *prima facie* evidence of title. The present suit was accordingly *held* to be maintainable.

Cases referred to and discussed—

*Monmatha Nath Dutt* v. *Matilal Mitra* (1); *Manmatha Nath Mullick* v. *Hedait Ali* (2); *Jewan Ram* v. *Ratan Chand Kissen Chand* (3); *Lep Singh Khasia* v. *Nimar Khasia* (4); *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (5); *Radha Churn Ghuttuck* v. *Zumuroonissa Khatoon* (6); *Samiulla* v. *Nil Mamud* (7); and *Surnomoyee* v. *Denonath Gir Sunnyasee* (8).

Appeal by the Defendants.

* Appeal from Appellate Decree No. 288 of 1948 against the decree of Sri A. B. Ganguly, Additional Subordinate Judge, District Burdwan at Asansol in Money Appeal No. 4/5 of 1947 dated 4-10-47 affirming the decree of Sri S. Chatterjee, Munsif, 1st Court, Asansol dated 31-3-47.

(1) (1928) 33 C.W.N. 614.
(2) (1931) L.R. 59 I.A. 41.
(3) (1921) 26 C.W.N. 285.
(4) (1893) I.L.R. 21 Calc. 244.
(5) (1911) 17 C.W.N. 324.
(6) (1868) 11 W.R. 83.
(7) (1916) 97 I.C. 564.
(8) (1883) I.L.R. 9 Calc. 908.

CIVIL.

1951.

Muralidhar Agarwalla v. Rupendra Nath Mitter

Suit for recovery of damages for use and occupation or alternatively, for mesne profits.

The material facts will appear from the judgment.

*Messrs. Hiralal Chakravarty and Jagadish Chandra Ghose* for the Appellants.

*Messrs. Satindra Nath Roy Choudhury and Sovendra Madhab Bose* for the Respondents.

The judgment of the Court was as follows:—

*July, 11.*

**P. N. Mookerjee, J.:**—This appeal by the defendants arises out of a suit for recovery of damages for use and occupation or alternatively, mesne profits. Upon the findings of the Courts below on the questions of fact which have not been and cannot be either in law or on the materials on records, challenged in this appeal the position stands thus:

The property in suit belonged originally, to Dr. Kartick Chandra Bose and Sons, of Calcutta, under a lease from the Chatterjee's on 23rd May 1945. This property was transferred by a conveyance by Dr. Kartick Chandra Bose and Sons to the plaintiffs of the present suit and by the said conveyance not only the property but also all right to realise arrears of rent, compensation etc., in respect of the said property was transferred to the plaintiffs. It is the plaintiffs case that the defendants had trespassed into the lands some time in June 1942, and were continuing their wrongful possession as trespassers. The plaintiffs have brought the present suit for damages for use and occupation, or alternatively for mesne profits, for the period February 1943 to January 1946 the prior period from June 1942 to January 1943 having been apparently left out of account because of the law of limitation. Both the courts below have decreed the plaintiffs suit.

In this appeal Mr. Chakravarty appearing on behalf of the defendants raised two contentions; (1) that the assignment of a claim for damages would be invalid under the law and therefore on the basis of the assignment of the right to recover compensation as made by the con-

veyance from Dr. Kartick Chandra Bose and Sons, the plaintiffs would not be entitled to get any relief and (2) that even assuming that such assignment was valid and gave the plaintiffs the right to recover compensation, the plaintiffs are not entitled to succeed in the present suit, as they having been out of possession at the date of the suit, cannot maintain a suit for damages or mesne profits without a suit for recovery of possession the more so, as the vendors also were out of possession at the date of this conveyance. In my opinion, none of the two contentions raised by Mr. Chakravarty can be accepted.

In support of his *first* contention Mr. Chakravarty relied upon section 6 (e) of the Transfer of Property Act and pointed out the difference in language between the said clause (e) and clause (c) of that section. According to Mr. Chakravarty this difference in language shows that even though the property itself might be transferred, and the right claimed may be incidental to the ownership of that property still the transfer of this right would be hit by clause (e) of section 6 of the Transfer of Property Act and that clause would make the assignment of such right invalid. I am unable to hold that this view of the matter is correct. The use of the word "mere" in clause (e) is significant and that in my opinion, is sufficient to show that when the property itself is transferred and along with it the right to claim compensation or damages in respect of the same, the transfer of the right to claim compensation or damages is a valid transfer. In other words, the same result is obtained by the use of the word "mere" in clause (e) as is obtained by the use of the expression "apart from dominant heritage" in clause (c). I am of opinion therefore that when a property is transferred and along with it a right to recover damages or compensation in respect of that property, the assignment of this right is a valid assignment and is not hit by clause (e) of section 6 of the Transfer of Property Act. In this view, I am supported by the authority of a Bench decision of this court in the case of *Monmatha Nath Dutt* v. *Matilal Mitra* (1), I may also mention here that neither the case of *Manmatha Nath Mullick* v. *Hedait Ali* (2), nor the case of *Jewan Ram* v. *Ratan Chand Kissen Chand* (3), is against

(1) (1928) 33 C.W.N. 614.
(2) (1931) L.R. 59 I.A. 41.
(3) (1921) 26 C.W.N. 285.

this view. There is nothing in any of the said two decisions which militates with the view which I have expressed above or the view which has been expressed in *Monmatha Nath Dutt* v. *Matilal Mitra* (1). Rather, it seems to me that the case in *Jewan Ram* v. *Ratan Chand Kissen Chand* (2), supports the said view.

In the Privy Council case in *Manmatha Nath Mullick* v. *Hedait Ali* (3), it was not necessary for their Lordships to consider this aspect of the matter as upon the admitted facts, their Lordships found that the claim which had been transferred in that case was an actionable claim, that is, a claim to a definite sum of money a claim by way of re-imbursement of money paid. In *Jewan Ram* v. *Ratan Chand Kissen Chand* (2), it was found that there was no transfer of the property but only the right to recover damages had been transferred, and in that view of the matter, their Lordships held that the assignment would not be valid. It is clear however from the discussion in *Jewan Ram* v. *Ratan Chand Kissen Chand* (2), that their Lordships recognised the discussion between transfer of a mere claim for damages in respect of a property and the transfer of the property along with the right to recover damages in respect of the same and expressed themselves unequivocally in favour of the validity of the assignment of the right to recover damages in this latter case.

I hold therefore, that there is no substance in the first contention raised by Mr. Chakravarty. It is accordingly overruled.

As to the *second* contention raised by Mr Chakravarty it is to be observed in the first place that upon the findings of the courts below there has been sufficient proof in the present case of title at any rate of a *prima facie* title in the plaintiffs. Mr. Chakravarty contends that, on the authority of the decisions in the cases of *Lep Singh Khasia* v. *Nimar Khasia* (4), and *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (5), this suit must be held to be not maintainable and the proper suit for the plaintiffs would be a suit for recovery of possession of the disputed

(1) (1928) 33 C.W.N. 614.
(2) (1921) 26 C.W.N. 285.
(3) (1931) L.R. 59 I.A. 41.
(4) (1893) I.L.R. 21 Calc. 244.
(5) (1911) 17 C.W.N. 324.

CIVIL.

1951.

Muralidhar Agarwalla v. Rupendra Nath Mitter

P. N. Mookerjee, J.

property in which they might also include the claim for damages or mesne profits.

It is true that the case in *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (1). states the proposition somewhat broadly in favour of Mr. Chakravarty, but it is equally true that in that case this question did not strictly arise and was not a relevant at any rate not a necessary issue. It is absolutely clear from *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (1), that there their Lordships distinguished the case in *Lep Singh Khasia* v. *Nimar Khasia* (2), on facts and proceeded to demonstrate that even upon the widest interpretation in favour of the defendant the case in *Lep Singh Khasia* v. *Nimar Khasia* (2), could not afford any assistance to him. I am convinced that the statement of the proposition in the broad form in which it appears in *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (1), is not an accurate statement of the decision in *Lep Singh Khasia* v. *Nimar Khasia* (2), and their Lordships in *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (1), never meant to lay down the proposition in those broad terms. *Giri Narain Chatterji* v. *Modhu Sudan Mukerji* (1), is therefore no authority in supporty of Mr. Chakravarty's second contention and cannot reasonably be construed having regard particularly to its actual decision adversely to the plaintiffs in the present suit.

As to the case in *Lep Singh Khasia* v. *Nimar Khasia* (2), it is enough to say that, apart from the fact that that case is also clearly distinguishable and is strictly speaking no authority on the present question, there is even in that case one observation which is highly significant and which really supports the plaintiffs respondents. It is clear from the decision in *Lep Singh Khasia* v. *Nimar Khasia* (2), that there their Lordships recognised that proof of title would entitle the plaintiff to a decree for mesne profits irrespective of the question of possession. That case related to a claim for the value of fruits grown in the suit land during the period of the plaintiffs alleged possession there of and the plaintiffs claim was sought to be resisted by the defendants by setting up title in themselves with regard to the

(1) (1911) 17 C.W.N. 324.

(2) (1893) I.L.R. 21 Calc. 244.

suit land. In these circumstances their Lordships held that (1) if the Defendants succeeded in proving title in themselves the plaintiffs suit would fail. (2) If the plaintiffs succeeded in proving their title their suit would be decreed and (3) if neither party succeeded in proving title the plaintiffs would still succeed, if the plaintiffs proved their possession of the suit land at the date of the suit and prior thereto. In my opinion there is nothing in *Lep Singh Khasia* v. *Nimar Khasia* (1), which supports Mr. Chakravarty's second contention, on the other hand, it seems to me that that decision when closely read is opposed to that contention as it clearly lays down that the plaintiff would be entitled to succeed if he has proved title to the suit property which in the context and the circumstances of that case, can only mean a *prima facie* title or to put it in other words the plaintiff would be entitled to succeed if he has given *prima facie* proof of title to the suit property. This conclusion seems irresistible when we remember that the case in *Lep Singh Khasia* v. *Nimar Khasia* (1), purports to be based and is also really based upon the decision in the case of *Radha Churn Ghuttuck* v. *Zumuroonissa Khatoon* (2). That decision, if closely analysed leads to this position that the plaintiff in a suit of the present type can succeed on *prima facie* proof of title and prior possession may under certain circumstances, be sufficient *prima facie* evidence of title. To my mind the cases in *Lep Singh Khasia* v. *Nimar Khasia* (1) and *Radha Churn Ghuttuck* v. *Zumuroonissa Khatoon* (2), rather appear to be authorities against the appellant at any rate no argument against the maintainability of the plaintiffs suit can be founded upon any of them. *Radha Churn's case* (2) has some resemblance to the present case and the decision therein substantially favours the Respondents.

In the above state of the law, the plaintiffs' suit cannot be held to be not maintainable as upon the findings of the Courts below and these findings are amply justified on the materials on record the plaintiffs title to the suit property has been sufficiently proved and there is no case or claim of that title having been extinguished by limitation or adverse possession and the test of *prima facie* evidence of title laid down by Sir Barnes

(1) (1893) I.L.R. 21 Calc. 244.

(2) (1868) 11 W.R. 85.

CIVIL.

1951.

Muralidhar Agarwalla v. Rupendra Nath Mitter

P. N. Mookerjee, J.

Peacock in *Radha Churn's case* (1), has been satisfied by the plaintiffs beyond all doubts.

There is also another aspect of the matter on the authority of the cases of *Samiulla* v. *Nil Mamud* (2) and *Surnomoyee* v. *Denonath Gir Sunnyasee* (3), the plaintiffs may be said to have waived the trespass and sued for damages. This position is clearly tenable as admittedly, in the present suit, there is a claim for damages for use and occupation and the claim for mesne profits is only in the alternative. In this view of the matter, apart from anything else, the present suit would be maintainable.

In the light of what I have said above I am bound to overrule also the second contention raised by Mr. Chakravarty and I reject the same.

My conclusion, therefore, is that the plaintiffs' suit has been rightly decreed by the courts below. This appeal, accordingly fails and is dismissed with costs.

Leave to appeal under clause 15 of the letters patent is asked for and is refused.

R.M.

*Appeal dismissed with costs.*

(1) (1868) 11 W.R. 88.
(2) (1916) 97 I.C. 564.
(3) (1883) I.L.R. 9 Calc. 908.

CIVIL REFERENCE.

CIVIL.

1951.

*April, 17.*
*June, 26.*

*Before Mr. Justice K. C. Das Gupta.*

ROUTHMULL BABU AND OTHERS

*v.*

KAMALAKSHA CHOWDHURY AND OTHERS.*

*Court Fees—Appeal against decree passed under Bengal Money Lenders' Act—Proper Court fee in relief against restoration.*

*Bengal Money Lenders' Act (X B.C of 1940)—Decree reopened—Order for restoration, appeal against—Court fee.*

In an appeal against a reopened decree under the Bengal Money Lenders' Act the relief against the order for restoration of properties is incapable of valuation and as such a fixed Court fee of Rs. 15/- is payable on the memorandum of appeal.

By the decree appealed from the appellants are no doubt deprived at once of possession of the properties but the title remains in them till the last instalment is paid when deprivation of possession would be permanent and title would pass. At the date of the appeal the deprivation of possession is of an uncertain character.

*Hrishikesh Mukerjee* v. *Jagadish Chandra Roy Chowdhury* (1), dissented from

Reference in the matter of Court fees in connection with an appeal by the Plaintiff mortgagee.

The material facts will appear from the judgment.

*Mr. Sachindra Chandra Das Gupta* for the Appellant.

*Mr. Jajneswar Majumdar,* Asstt. Govt. Pleader for the State.

C.A.V.

The judgment of the Court was as follows:—

**K. C. Das Gupta, J.:**—The appeal in which this reference has been made is against a decree passed under section 36 of the Bengal Money Lenders' Act. The decree is in these terms. *June, 26.*

* Reference in the matter of Court fees in F.M.A. T. 1035 of 1950.

(1) (1945) 49 C.W.N. 385.

CIVIL.

1951.

Routhmull Babu v. Kamalaksha Chowdhury

*Das Gupta, J.*

It is ordered and decreed that as per judgment delivered in Miscellaneous Case No. 127 of 1941 the mortgage decree is re-opened and a new decree is made for Rs. 39,932-12. This amount is to be paid by the defendants to the plaintiff in thirteen equal annual instalments falling due in Falgoon of the years 1357 B.S. to 1369 B.S. The defendants will be restored to possession of items Nos. 1, 3 and 5 of Schedule Ka and all the items of Schedule Kha. In default of payment of any of the instalments ordered above the plaintiff shall get back possession of the properties of Schedule Kha and items Nos. 1, 3 and 5 of Schedule Ka and in that case the amount for which the mortgage execution purchase in respect of them took place shall be set off against so much of the amount of this new decree as shall remain unsatisfied at that time.

In this appeal which was preferred by the mortgagee and is on his death being prosecuted by his heirs and legal representatives, the correctness of this decree is challenged first in so far as it orders the restoration of items 5 to 17 of Schedule Kha, secondly in so far as it orders restoration of any of the properties and thirdly as regards the amount of the decree. The challenge to the restoration of items 5 to 17 is made in grounds 5, 6, 8, 9 and 10. The general challenge against restoration of any of the properties has been made in grounds 4 and 11, while the challenge as regards the amount of the decree has been made in ground No. 12 of the Memorandum of Appeal.

Court fee stamp of Rs. 5/- was paid on this memorandum on the basis that this was a first miscellaneous appeal.

On the authorities it is clear however that Court fees should be paid on this appeal as an appeal against an original decree and not as a first Miscellaneous Appeal. It is equally clear on the authorities that if the relief sought in this appeal can be valued *ad valorem* Court fees under Schedule 1 Article 1 of the Court Fees Act must be paid, if however the relief is incapable of valuation a fixed Court fee of Rs. 15/- as provided in Article 17 (vi) of Schedule II of the Court Fees Act is payable.

There question which has arisen in this case is whether the relief sought in this appeal is capable of valuation. In so far

as the appellants ask for a decree for a higher amount the relief sought is clearly the amount by which according to the appellants the decretal amount should be increased. The appellants have not mentioned the amount, but they merely stated in ground No. 12. The learned Subordinate Judge has erred in law in not considering the objection to the effect that apart from accounting of mortgage dues there were other incidental claims of the decree holder arising out of and in connection with the restoration matter which ought to have been added to the amount arrived at by accounting. "It is quite clear that the relief which the appellants seek in this ground is capable of valuation if the appellants will state the excess amount which they claim. The appellants if they want to retain this challenge to the decree passed by the Court below must state the amount by which according to them the decretal amount should be increased and must pay *ad valorem* Court fees on this amount.

The other relief sought in this appeal is as regards the restoration of the properties. The learned court below having made an order for restoration the appellants now want by this appeal to have that order of restoration set aside. The question is whether this relief is capable of valuation. This question was answered in the affirmative by Mr. Justice Akram in *Hrishikesh Mukherjee* v. *Jagadish Chandra Roy Chowdhury* (1). The reasons for the decision are given in these words clearly therefore the object of the appellant is not to give up possession of the properties. That is his main purpose and that he aims at in the appeal by attacking directly the orders for restoration of possession of the property of the plaintiff and by attacking indirectly the same order by challenging the validity of the decree itself which contains the order. If he succeeds in the appeal by either process he retains the possession of the property. He must therefore pay *ad valorem* court fees on the value of the property under Article I, Schedule I of the Court Fees Act.

This reasoning proceeds on the assumption that the decree appealed from has totally and certainly deprived the appellant of title and possession to the property. With great respect to the learned Judge I am of opinion that this assumption is wrong.

(1) (1945) 49 C.W.N. 885.

CIVIL.

1951.

Routhmull Babu v. Kamalaksha Chowdhury

*Das Gupta, J.*

By the decree appealed from the appellants are no doubt deprived at once of possession of the properties. But for the present the title remains in them, if no default is made in the payment of any of the instalments then after the last instalment is paid this deprivation of possession will be permanent and title will also pass from the appellants; if however there is default in the payment of any instalment the appellants will get back possession of the properties.

At the date of the appeal no one can say whether default will or will not be made in the payment of the instalments. The deprivation of possession under the decree is therefore of an uncertain character. It may be permanent or it may not be permanent. It may cease in any of the years 1357 B.S. to 1369 B.S. or it may not cease at all. It is this uncertain deprivation that the appellants want to get rid of in this appeal. The consequence of this uncertainty in the nature of what the appellants want to get rid of by this appeal is that the value of the relief sought in the appeal is uncertain. It must therefore be held that this relief is incapable of valuation.

My conclusion, therefore, is that in so far as this appeal is directed against the restoration of properties only a fixed fee of Rs. 15/- is payable on the memorandum of appeal. In so far as the appeal is directed against the amount of the decree and asks this amount to be enhanced the appellants must make a definite statement of the amount by which the decree should be enhanced and pay *ad valorem* Court fees on this stated amount.

S.D.G. *Reference answered.*

## ORIGINAL CIVIL.

*Before Mr. Justice H. K. Bose.*

NALINI RANJAN GUHA

*v.*

ANNADA SHANKAR RAY.*

CIVIL.

1951.

*July, 2.*

*Certiorari, writ of—Alternative remedy by way of appeal—If bars the issue of a Writ.—Acquiescence with or submission to jurisdiction of the Tribunal—If stops a challenge to jurisdiction—Power to quash order in cases of wrong assumption of jurisdiction by a Tribunal.*

*War Injuries Ordinance (VII of 1941) as amended by Ordinance Nos. I and XXXIX of 1942—Takes away all rights to sue in Court for breach of contract or to claim under Workmen's Compensation Act.*

*Workmen's Compensation Act (VIII of 1923)—If applies in cases of War injuries.*

It is clear from sections 3 and 4 of the War Injuries Ordinance that neither the Workmen's Compensation Act nor any other existing legislation applies in case of War injuries. Such injuries are regarded as a special class of injury outside the intention and scope of previous legislation and compensation therefore are to be guided by the provision in the Ordinances. Jurisdiction of Commissioner of Workmen's Compensation is completely ousted.

*Billings* v. *Reed* (1) and *Adams* v. *Naylor* (2) relied on.

Where there is inherent want or absence of jurisdiction no amount of consent or acquiescence can vest the tribunal with jurisdiction. Submission of a petition for refund and withdrawing the sum upon an undertaking, submission to enquiries and appealing against the order did not, in the circumstances of the case, amount to an acquiescence to jurisdiction.

*Ledgard* v. *Bull* (3); *Farquharson* v. *Morgan* (4) and *Halsbury, Vol. 9, paras. 1402-1404, p. 826-828* referred to.

* Application for a Writ in the nature of *Certiorari* for quashing of orders dated 17-2-49 and 1-3-49 made by the Respondent under the Workmen's Compensation Act. Matter No. 10 of 1949.

(1) [1944] 2 All. E.R. 415.

(2) [1946] App. Cas. 543.

(3) (1886) L.R. 13 I.A. 134 (140, 144-145).

(4) [1894] 1 Q.B. 552 (557, 559 to 560).

CIVIL.

1951.

Nalini Ranjan Guha
v.
Annada Shankar Ray.

It is well settled proposition that although the Writ is not available as a matter of course, it will nevertheless be granted *ex debito justitiae* to quash proceedings where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction and the Writ is available to the applicant although there is an alternative remedy.

*The Queen* v. *The Justices of Surrey* (1); *The King* v. *Post Master General, Ex parte Carmichael* (2); *Jackson* v. *Beaumont* (3); *Channel Coaling Co.* v. *Ross* (4) *Halsbury, Vol. 9, Paragraph 1481, p. 878-879* referred to.

Application by Nalini Ranjan Guha under clauses 4 and 21 of the Charter for a Writ in the nature of Certiorari for quashing orders made by the Respondent under Workmen's Compensation Act.

The material facts will appear from the judgment.

*Messrs. R. Chowdhury, S. Basu* and *A. K. Das Gupta* for the Petitioner.

*Messrs. S. M. Bose, Sanker Banerjee* and *Asoke Kumar Sen* for the Respondent.

The judgment of the Court was as follows:—

*July, 2.*

**H. K. Bose, J.:**—This is an application under clauses 4 and 21 of the Charter for a writ in the nature of certiorari for quashing of the orders dated the 17th of February, 1949 and 1st of March, 1949 made by the respondent under the Workmen's Compensation Act.

The petitioner at all material times was a contractor of the Central Public Works Department in connection with the construction and maintenance of Aerodromes at different parts of India. In course of such employment as contractor the petitioner was entrusted with some work in the Barrackpore Aerodrome in May 1942. For the purpose of such work the petitioner employed labourers at the Military Aerodrome at Barrackpore. On or about the 11th June, 1944, the petitioner's gang was working in the Aerodrome at some distance away from

(1) (1870) L.R. 5 Q.B. 466.
(2) [1928] 1 K.B. 291 (299, 301).
(3) (1855) 11 Ex. 500; 156 E.R. 844 (845, 846).
(4) [1907] 1 K.B. 145 (148, 149).

CIVIL.

1951.

Nalini Ranjan Guha
v.
Annada Shankar Ray.

*Bose, J.*

the edge of the runway. Three of the labourers named Punia, Jinnat and Suphal Sha were killed as a result of impact with United State Army Air Force Supply Plane which was about to take off from the said Aerodrome for supply operations. The said Aeroplane belonging to the U. S. Army was employed for the benefit of His Majesty and Allied powers in connection with the furtherance of the war. It is stated in the petition that for the said fatal injuries to the said three labourers the petitioner was in no way responsible. The plane was being piloted by American Army Air force pilot and one of the engines having suddenly stopped, the plane took an abrupt turn and shot out of the runway and the said three labourers sustained fatal injuries as a result of the impact with the said plane. Certain departmental enquiries were made by the Executive Engineer, Superintending Engineer and the Sub-Divisional Officer-in-Charge of the Aerodrome but no dependants of the deceased could be traced. On the 13th of June, 1944 a fatal accident report was sent to the Commissioner of Workmen's Compensation. It was pointed out in that report that the injuries were due to direct dashing of the Aeroplane while taking off and the dead bodies were taken away by R. A. F. Ambulance, Barrackpore. On or about the 12th October, 1944 a police report was forwarded by the S. D. O. to the Executive Engineer which stated that dependants of the deceased could not be traced. Thereafter some departmental correspondence passed between the Workmen's Compensation Commissioner and the Central Public Works Department in which it was pointed out to the commissioner that the death of the three coolies were caused by a big U. S. Air force plane which was passing through the Centre of the runway before taking off when the aircraft suddenly shifted its course with a terrific speed and dashed against the three labourers who were working at a distance of about 100 ft. from the edge of the runway and killed them instantaneously and thereafter certain military officers arrived on the spot and arranged for the removal of the dead bodies by an Ambulance Car and the Commissioner was asked to give his decision upon those facts stated. In a letter dated the 8th of July, 1946, the Executive Engineer, Calcutta Aviation Division specifically sought the decision of the Commissioner on the point as to whether the cases could be regulated by the provisions of the War Injuries Ordinance 1941. There appears to be an endorse-

CIVIL.

1951.

Nalini Ranjan Guha
v.
Annada Shankar Ray.

*Bose, J.*

ment on the back of this letter dated the 11th of July, 1946, which shows that the Commissioner was of the opinion that there was nothing on record from which it could be inferred that the Aircraft belonged to or was held by any person on behalf of or by His Majesty or any Allied Power. The then Commissioner took the view that the Workmen's Compensation Act applied to the accident cases. In or about March, 1948, a sum of Rs. 2,700/- was withheld by the Central Public Works Department from out of the sum of Rs. 6,000/- which was settled in respect of the bills of the petitioner, for work done in the Airfield, and the said sum of Rs. 2,700/- was sent to the Workmen's Compensation Commissioner with a covering letter intimating that the said sum of Rs. 2,700/- was the money due and payable to the petitioner and was being deposited for the compensation cases. The petitioner made demands for return of the deposit between May, 1948 and November, 1948. On or about the 26th November 1948 Mr. S. Halder, the then Commissioner ordered refund of the deposit but the office returned only the file in respect of one accident case but did not return the files of the other two cases. It is alleged that some time in December, 1948, some dependants of the two persons whose files have been kept in the office were procured and the Commissioner by two orders made subsequently on the 17th February, 1949 and 1st of March, 1949 directed payment of certain sums to the alleged dependants of the two deceased persons.

The petitioner charges that these orders were made without jurisdiction by the respondent and were made arbitrarily and illegally.

The petitioner states that the provisions of the War Injuries Ordinance (No. 7 of 1941 as amended by Ordinance Nos, 1 and 39 of 1942) which was in force at all material times applied to the accident cases in question and excluded the liability if any of the petitioner under the Workmen's Compensation Act. In the circumstances the petitioner moved this court for the reliefs stated above.

Mr. A. K. Sen the learned counsel for the respondent has urged that the petitioners having submitted to the jurisdiction

of the Commissioner of the Workmen's Compensation has disentitled himself to get any relief in this application. Mr. Sen points out that the petitioner submitted a petition for refund of the amount deposited with the Workmen's Compensation Commissioner on the 26th July, 1948 upon which an order for refund was made by the then Commissioner on the 24th November 1948 on condition of the petitioner giving the usual undertaking to redeposit the amount when any claimant appears. On the 29th November 1948 the petitioner in compliance with the order gave the undertaking to redeposit the amount and on the 3rd December, 1948, obtained refund of the money under the said order of the Commissioner. Thereafter the petitioner took part in the inquiry held by the Commissioner, made his submission before him and has appealed from his order to the High Court and has thus precluded himself from challenging the jurisdiction of the Commissioner in the present proceedings.

Reliance is placed by Mr. Sen on *Corpus Juris Vol. XI page 138 Article 103* which is set out as hereunder:

> "A party may be stopped to avail himself of the writ where he has invoked the jurisdiction, has submitted himself thereto without objection or has acquiesced in or has expressly consented to or sanctioned the course of the proceeding."

The decisions on which this statement is based are not available.

Mr. Sen also relies on *Halsbury, Vol. 9, paragraph 1493, page 826-827.*

It has to be noted however that the conduct of the petitioner has been far from one of submission to jurisdiction. In paragraphs 1 and 2 of his petition for refund filed before the Commissioner on the 26th July 1948 it is pointed out that the labourer concerned died as a result of an accident due to bad mechanism and bad handling of an aeroplane belonging to U.S. A.A.F. over which the petitioner had no control, and the money was deposited by the government out of fund belonging to the petitioner despite objection of the petitioner as to his

CIVIL.

1951.

Nalini Ranjan Guha v. Annada Shankar Ray.

*Bose, J.*

liability to pay any compensation. There is no express objection taken as to the want of jurisdiction of the Commissioner on the ground that the labourer met his death due to a war injury but the facts stated show that the petitioner was disclaiming liability for the reasons set forth in paragraphs 1 to 4 of that petition.

Even as early as the 8th January 1947 when replying to the notice issued by the Commissioner and dated the 16th December 1946, he relied on these very grounds, though less happily worded, as exonerating him from liability to pay any compensation. Prior to these, letter dated the 8th July 1946, 17th July 1946, and September 1946 between the Central Public Works Department and the Commissioner Workmen's Compensation had passed and so it was clear to all what the petitioner was driving at when referring repeatedly to the nature of the accident.

Further, the petition of objection which the petitioner filed before the Commissioner in the Distribution Case No. 46 of 1948 clearly shows that the petitioner's definite case was that the death was caused by a war injury and therefore War Injuries Ordinance governed the matter and the petitioner's liability whether contractual or under the Workmen's Compensation Act was excluded.

In the face of these facts I find it difficult to hold that the petitioner unequivocally or unconditionally submitted to or acquiesced in the jurisdiction of the Commissioner of the Workmen's Compensation in respect of the proceedings pending before him.

Apart from that it is settled law that where there is inherent want or absence of jurisdiction no amount of consent or acquiescence can vest the tribunal with jurisdiction. See *Ledgard* v. *Bull* (1) and *Farquharson* v. *Morgan* (2). See also *Halsbury, Vol. 9, paragraph 1402-1404, pages 826-828.*

This contention of Mr. Sen appears to me to be without any substance.

(1) (1886) L.R. 13 I.A. 134 (140, 144-145).
(2) [1894] 1 Q.B. 552 (557, 559-560).

CIVIL.

1951.

Nalini Ranjan Guha v. Annada Shankar Ray.

*Bose, J.*

Another objection taken by Mr. Sen relates to the non-joinder of the dependants of the deceased to whom the compensation has been directed to be paid. Mr. Sen submits that in their absence the application is not maintainable. The learned counsel for the petitioner has produced postal receipts to show that notices of the hearing of the application were sought to be served by registered post on the dependants at the latter's address furnished by the Government department but the letter have come back as the dependants could not be traced. It appears to me extremely unlikely that the dependants poor as they are would have come forward to take part in the proceeding even if they had been actually served. The petitioner has made efforts to serve them with notice but he has failed for no fault of his own. The application has been strongly opposed on behalf of the Respondent and I do not think that the presence of the dependants would have in any way improved matters especially as they were no where near the scene of the accident at the time it took place. In my view the petition cannot be thrown out for the alleged defect of parties as urged on behalf of the respondent.

It has also been contended by Mr. Sen that the petitioner had an alternative remedy by way of Appeal under the Workmen's Compensation Act and so he cannot have recourse to the extraordinary remedy of certiorari. It is a well settled proposition that although the writ is not available as a matter of course it will nevertheless be granted *ex debito justitiae*, to quash proceedings which the court has power to quash, where the application is by an aggrieved party and it is shown that the court below has acted without jurisdiction or in excess of jurisdiction, [*The Queen* v. *The Justices of Surrey* (1)] and the writ is available to the applicant although there is an alternative remedy.

In the case of *The King* v. *Postmaster General, Exparte Carmichael* (2) an appeal has been actually preferred but this was held to be no bar to a writ of Certiorari being issued.

In an earlier case *Jackson* v. *Beaumont* (3) an appeal was pending when the Rule for issue of the writ of prohibition came

(1) (1870) L.R. 5 Q.B. 466.
(2) [1928] 1 K.B. 291 (299, 301).
(3) (1855) 11 Ex. 300; 156 E.R. 844 (845-846).

CIVIL.

1951.

Nalini Ranjan Guha v. Annada Shankar Ray.

*Bose, J.*

up for hearing. The writ was allowed to go and the Rule was made absolute.

See also *Channel Coaling Company* v. *Ross* (1) and *Halsbury, Vol. 9, Paragraph 1481, page 878-879.*

In the case before me an appeal was preferred from the order of the Commissioner to the High Court but as the dependants of the deceased could not be traced and service could not be effected on them the appeal was struck out. In the affidavit in reply however (paragraph 20) a different story is told about the fate of the appeal.

It is clear that the question of jurisdiction of the Workmen's Compensation Commissioner was brought into prominence from the very beginning on the 11th July, 1946, the Commissioner Mr. B. K. Basu and Co., I.C.S., who had perhaps only the Fatal Accident Report before him found nothing on record to show that the aircraft belonged either to an enemy or belonged to or was held by any person on behalf of or for the benefit of His Majesty or Allied power. But subsequent letter dated the 2nd September, 1946, and the petition filed by the petitioner before the Commissioner made it clear what the actual facts were but yet the Commissioner thought that the War Injuries Ordinance did not apply and he assumed jurisdiction in the matter. The affidavit in opposition filed by the respondent indicates that he considered this question of jurisdiction and came to the conclusion that the ordinance was not applicable to the facts and circumstance of the case. The petitioner's petition of objection appears to have been summarily rejected without giving him opportunity to establish his case on the 1st March, 1949, and the final award was made on that date. The petitioner was asked to make his submissions of law somewhere else. It is clear that the petitioner was not given proper opportunities to present his case before the respondent. The respondent was no doubt actuated and impelled by laudable motives to hand over some money to certain poor persons but he had no right to refuse hearing and deny natural justice to the petitioner. Although there is conflict of decisions on the point whether the writ of certiorari is a discretionary writ or a writ of right yet as in the present case the objection to jurisdiction was apparent on

(1) [1907] 1 K.B. 145 (148, 149).

the face of the proceedings, the alternative remedy cannot stand in the way of the writ being issued in this case if there is found to be an absence of or excess of jurisdiction in the Commissioner of Workmen's Compensation in dealing with the matter in question.

The objection of Mr. Sen on the score of there being an alternative remedy cannot be sustained.

The War Injuries Ordinance (Ordinance No. VII of 1941 as amended by Ordinances Nos. I and XXXIX of 1942) defines a "War Injury" as meaning a physical injury caused by (among other things mentioned) the impact on any person or property of any enemy aircraft or any aircraft belonging to or held by any person on behalf of or for the benefit of His Majesty or any Allied power or any part of or anything dropped from any such aircraft. [Section 2(6) (b)].

Section 3 provides for making of schemes under the ordinance and provides for the powers of the Central Government and the authority authorised by the Central Government, to make payments under the scheme or for giving effect to the purposes of the scheme. A different department is set up to deal with matters of war injuries and to determine questions of compensation payable for such injuries (Sections 3, 4 and 5 of the Ordinance).

Section 4 of the Ordinance provides for relief from liability to pay compensation or damages. The relevant portion of the provision is as follows. "In respect of a war injury sustained during the continuance of the present hostilities by any person, and in respect of a war service injury sustained during that period by civil defence volunteer, no such compensation or damage shall be payable whether to the person injured or to any other person, as apart from the provisions of this sub-section (a) would be payable under the Workmen's Compensation Act 1923 (VIII of 1923) or (b) would whether by virtue of any enactment or by virtue of any contract or at common law, be payable (i) in the case of a war injury by any person on the ground that the injury in question was attributable to the some negligence nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible.

CIVIL.

1951.

Nalini Ranjan Guha
v.
Annada Shankar Ray.

*Bose, J.*

It is clear from the aforesaid provisions that neither the Workmen's Compensation Act nor any other existing legislation is to apply in the case of war injuries. The war injuries are regarded as a special class of injury outside the intention and scope of previous legislation and compensation for such injuries is to be determined and paid in accordance with the scheme framed and by the authorities appointed under the Ordinance.

In the case of *Billings* v. *Reed* (1), an action was brought under the Fatal Accident Act 1846 and Law Reform (Miscellaneous Provisions) Act 1934 by the personal representative of a woman who met her death owing to the negligence of the defendant, a pilot in the Royal Air Force who flew an aeroplane at a height of less then 6 ft. over a field in which she was engaged on farm work. The defendant admitted negligence but pleaded that he was relieved from liability for damages under the provisions of the Personal Injuries (Emergency Provisions Act 1939, 2 and 3 Geo. VI Ch. 82). The provisions of this English Act are worded in practically similar terms as the Indian War Injuries Ordinance. Lord Greene M. R. in construing a provision similar to section 4 of the Indian Ordinance observed—

"Putting it shortly the broad effect of that provision read according to its ordinary meaning appears to me to be that in the case of War Injuries all rights to sue in tort or for breach of contract or to claim under the Workmen's Compensation Act or any other enactment is taken away where the injury in question is a war injury and the cause of action is based on some negligence, nuisance or breach of duty. That again for the sake of complete accuracy, must be qualified by remembering that the right to claim under the Workmen's Compensation Act is expressly excluded and the words "attributable to some negligence, nuisance or breach of duty" do not apply in that case, it is a separate case."

In the case of *Adams* v. *Naylor* (2) the facts were that three boys Robert Adams, aged 12, Charles Adams, aged 13, and Frank Smith, aged 13, were playing in the sandhills which fringe the Lancashire Coast between Crossby and South-

(1) [1944] 2 All. E.R. 415.
(2) [1946] App. Cas. 543.

port just above the high watermark. The military authorities, as a provision against enemy attempts at invasion had constructed a minefield in the sandhills and to prevent the risk of the public entering the mined area had surrounded it with a fence of thick barbed wire. One of the boys kicked a tennis ball over the top strand of wire and in retrieving it Frank Smith happened to cause one of the buried mines to explode and was instantly killed, while Robert Adams was seriously injured. Robert Adams and the mother of Frank Smith brought action against the defendant who was an officer in the Royal Engineers and was at all times in control and responsible for the maintenance and safeguarding of the minefield, alleging negligence in failing to keep the fence effective and not giving adequate warning of danger. The House of Lords held that as the case was a case of "War Injury" within the meaning of Section 3(1) of the Personal Injuries (Emergency Provisions) Act 1939 the Defendant was exonerated from liability and the right of action was excluded.

Thus there appears to be a complete ouster of jurisdiction of the Commissioner of Workmen's Compensation in case the death was caused by a War Injury:

> The Government of India's War Department also issued a circular in September, 1944, to the effect "that the Governor-General in Council had accepted the principle that *ex gratia* compensation would be paid at Workmen's Compensation Act rates to labourers employed by a contractor on the construction and/or maintenance of airfields in respect of War Injuries (as defined in War Injuries Ordinance 1941) sustained by them in execution of their duties. This will apply to airfields under the supervision of the various constructional agencies e.g. Military Engineer services, Central Provincial and State P.W.D.S."

The injury which caused the death of the labourers in the present case was sustained by impact of the United States Army Air Force plane while the deceased workmen were engaged in work in the Barrackpore Airfield maintained under the supervision of the Central Public Works Department. It is clear that the injury was a war injury as defined in the Ordinance and the Commissioner had no jurisdiction to entertain any compensation

CIVIL.

1951.

Nalini Ranjan Guha v. Annada Shankar Ray.

*Bose, J.*

proceedings in respect of the case of deceased workmen or to pass the orders dated the 17th February, 1949, and the 1st March, 1949, as he has purported to do.

It was contended by Mr. A. K. Sen, that even assuming that the Commissioner was wrong in his finding that the injury was not a war injury this Court has no jurisdiction to interfere with the finding. I do not think that this contention has any force at all. This fact whether injury was a war injury or not was a question on which the jurisdiction of the Commissioner to deal with the cases of the deceased workmen depended. He was called upon to decide this question of fact before he could assume jurisdiction. It has been held in numerous cases that if the inferior court has decided wrongly facts which are conditions precedent to the exercise of jurisdiction such decision may be questioned and the superior court has power to quash it by certiorari. [See *Queen* v. *The Commissioners for Special Purposes of the Income Tax* (1) and *R.* v. *City of London etc. Rent Tribunal: Exparte Honig* (2), at page 197 (per Goddard C.J.) and at 198 (per Parker J.). See also *Halsbury Vol. 9, paragraph 1485 page 881.*

The affidavit of the respondent who has purported to pass the orders complained of has the effect of making those orders speaking orders and hence this court has power to quash the order by writ of certiorari. [See *Rex* v. *Northumberland Compensation Appeal Tribunal; Exparte Shaw* (3)]. It is true that the orders on the face of them do not set out the reasons for making these orders but fortunately for the petitioner the person responsible for making these orders is before the court and has set forth the reasons in the affidavit filed by him.

In my view this petition must succeed. The rule is made absolute. The orders dated the 17th February, 1949 and 1st March, 1949 are quashed. The petitioner is entitled to costs of the present proceedings.

*Mr. M. K. Roy Chowdhury*: Solicitor for the Applicant.

*Mr. N. C. Mitra*: Solicitor for the Respondent.

S.D.G. *Rule made absolute.*

(1) (1888) 21 Q.B.D. 313 (319).
(2) [1951] 1 All. E R. 195.
(3) [1951] 1 K.B. 711.

## CIVIL REVISION.

*Before Mr. Justice P. N. Mookerjee.*

NARESH CHANDRA GUHA

*v.*

RAM CHANDRA SAMONTA AND OTHERS.*

CIVIL.

1951.

*July, 10*

*Contract for sale of land—Rights of purchaser in case of non-performance—Earnest money, character of—Absence of forfeiture clause in the contract, effect of.*

*Indian Contract Act (IX of 1872). Sections 64, 65 and 74—Application of, in cases of earnest money.*

*Vendor and Purchaser—Respective rights to the earnest money.*

Earnest money paid in respect of a contract for sale of land is just a security or earnest for the performance of the contract. It is liable to be forfeited if the contract fails by reason of purchaser's default; he is entitled to refund if the contract fails not for his default. Mere presence or absence of a forfeiture clause in the contract makes no difference.

Case laws discussed.

So long the contract of sale is not performed the rights of the parties with regard to the earnest money rest upon a contract distinct from the real or pure contract of sale which may from its nature aptly be called a contract of security evidenced by the covenants or implied by law. It may be called ancillary contract.

Case laws discussed.

Benefit accrued to the vendor by forfeiture is one not under the contract of sale which alone is rescinded but under contract of security which remains in force. Sections 64 and 65 of the Indian Contract Act is not applicable to such benefits, neither section 74 of the Indian Contract Act applies to such cases as no question of breach of the Contract of security could arise.

*Muralidhar* v. *International Film Co. Ltd.* (1), relied on.

English and Indian cases discussed.

Application by the Plaintiff.

* Civil Revision Case No. 865 of 1950 arising out of S.C.C. Suit No. 3 of 1949 of the Court of the Subordinate Judge, 2nd Court, Alipore.

(1) [1943] A.I.R. P.C. 34 (38-39).

CIVIL.

1951.

Naresh Chandra Guha v. Ram Chandra Samonta

Suit for recovery of a certain sum of money paid by the Plaintiff as earnest money in connection with an agreement for sale of land.

The material facts will appear from the judgment.

*Messrs. Ram Krishna Pal and Sourindra N. Ghosh* for the Petitioner.

*Mr. Chandidas Ray Chaudhury* for the Opposite Parties.

The judgment of the Court was as follows:—

*July, 10.*

**P. N. Mookerjee, J.:**—This rule has been obtained by the Plaintiff against the dismissal of his suit for, *inter alia,* recovery of a certain sum of money, paid by him as earnest money in connection with an agreement for sale of land. In the suit there was also a claim for interest by way of damages. The suit has been dismissed by the learned Subordinate Judge, exercising powers under the Provincial Small Cause Court Act, and in this rule, the plaintiff has challenged the said dismissal.

The material facts lie within a short compass and they are as follows:—On March 24, 1948, the defendants opposite parties executed in favour of the plaintiff petitioner a *baina* or agreement for sale, Exht. 1, in respect of certain lands and received from him (the plaintiff) a sum of Rs. 501/- as and by way of earnest money. Later on the parties differed as to the extent and scope of the subject matter of the said *baina,* Exht. 1 with the result that the transaction eventually fell through. Thereupon, the plaintiff demanded back the earnest money and the defendants having refused to return the same the plaintiff instituted the present suit.

The plaintiffs main allegations were that the transaction had fallen through owing to default on the part of the defendants, in other words, that the defendants were guilty of breach of contract and that, accordingly, the plaintiff was entitled to a return of the earnest money and was also, in the circumstances, entitled to interest by way of damages.

The defence, *inter alia*, was that the defendants had, in the exercise of their lawful rights, forfeited the earnest money and as such the plaintiff was not entitled to its return or to any relief in the suit.

According to both parties, the contract was at an end. Each party, however, accused the other of having broken the contract. The plaintiff contended that the *baina*, Exht. 1, entitled him to the disputed lands in mokarari rights (including the subordinate interest, if any), in other words, to the superior or mokarari interest and also to the subordinate interest, if any in the disputed lands and to khas or actual possession of the said lands. The defence, on the other hand, was that, upon a proper construction of the *baina*, Exht. 1, the plaintiff was entitled only to the superior or mokarari interest in the disputed lands as distinct from the Subordinate interest, if any and was entitled to possession only of the superior interest and not to actual or khas possession of the said lands.

The learned Subordinate Judge held against the plaintiff on the question of construction of the *baina* Exht. 1, and found that the plaintiff was the party in default, in other words, that the plaintiff was guilty of breach of contract, and he held further that the defendants had lawfully forfeited the earnest money. On the above findings the learned Subordinate Judge dismissed the plaintiff's suit.

In this rule, two contentions have been raised on behalf of the plaintiff petitioner. *One* is that, on the question of construction of the *baina*, Exht. 1, the learned Subordinate Judge was in error in not accepting the plaintiff's case, as set out above, and that because of this mistake, the learned Subordinate Judge came to a wrong conclusion on the question of responsibility for the breach of contract, in other words, that he was wrong in finding that the plaintiff was guilty of the breach.

The *second* contention is that even assuming that the learned Subordinate Judge's construction of the *baina*, Exht. 1, was correct and that the plaintiff had been guilty of breach of contract, still the defendants were not entitled to forfeit the earnest money and the plaintiff was notwithstanding the default on his part, entitled to its return.

CIVIL

1951.

Naresh Chandra Guha
v.
Ram Chandra Samonta

P. N. Mookerjee, J.

*The first* contention of the petitioner presents no serious difficulty. The *baina*, Exht. 1, expressly mentions that the defendants had only the superior or mokarari interest in the disputed lands and that there was a subordinate interest therein in the name of one, Haroo Sardar which subordinate interest had already been purchased by the plaintiff. There is also nothing in the *baina*, Exht. 1, to show that the defendants undertook to put the plaintiff in khas or actual possession of the disputed land. In the above context it is also quite clear from the *baina*, Exht. 1, that the reference to the Subordinate Khatian in the Schedule and in the body of the *baina* (Exht. 1) was merely for the purpose of identifying the site of the lands agreed to be sold. In such circumstances, it cannot be said that the defendants had stipulated by the agreement, Exht. 1, to sell any subordinate interest as well, or to give the plaintiff khas or actual possession of the disputed lands. The plaintiff's case therefore on the question of construction of the *baina*, Exht. 1 must fail.

It has not been disputed and, indeed, it cannot be disputed on the materials on record that if the plaintiff's case on the construction of the *baina*, Exht. 1 fail, he must be held to have been guilty of breach of the contract. Consequently there is no escape from the conclusion that it was the plaintiff and not the defendants who was the party in default or in other words, that the plaintiff was guilty of breach of the contract in question. The learned Subordinate Judge's finding in this respect must, therefore, be affirmed and the petitioners first contention must be overruled.

The petitioners *second* contention, however raises a rather serious and difficult problem. Admittedly, there is in the *baina* Exht. 1 no clause authorizing forfeiture of the earnest money. Admittedly also, there is therein no clause providing for refund or return of the same. In such circumstances, the question arises as to what are the rights of the respective parties in regard to the earnest money when the contract for sale has been broken by the intending purchaser usually called and hereinafter also referred to as the purchaser.

The question thus raised has often come before the Courts both here and in England. Sometimes the question has also arisen under slightly different circumstances, namely where the *bana* or agreement for sale contained an express clause or covenant for forfeiture of the earnest money or deposit or deposit money as it was variously called in case of default on the part of the purchaser. This difference in circumstance however, has never been considered to be material for the decision of the rights of the parties with regard to such money [see the observations of Mellish, L.J. in *Exparte Barrell, In re Parnell* (1) and see also *Hall* v. *Burnell* (2), *Bishan Chand* v. *Radha Kishan Das* (3), *Roshan Lal* v. *The Delhi Cloth & General Mills Co., Ltd.* (4) and *Mangobinda Dutta* v. *J. Baisogmaff* (5)] and agreements containing covenants or clauses of forfeiture in regard to such money, have in this respect, been always treated on the same footing as agreements without the same provided of course, there is no clause for return or refund of the money in question, applicable to the particular circumstances [vide *Howe* v. *Smith* (6) and *Natesa* v. *Appava* (7) *and Halsbury's Laws of England, Second Edition, Vol. 29, pages 375-6, Art 514*]. One aspect of the matter which has often caused considerable anxiety to Judges had reference to the nature of the money in question whether described as earnest money or deposit or deposit money namely, whether it was intended to serve as earnest money in the real sense of the term, that is whether it was intended to serve as earnest or security for the performance of the contract in question, necessarily implying a liability to forfeiture in case of default on the part of payer or depositor, that is the purchaser. This difficulty has always been resolved by Judges by applying what may appositely be described as the golden rule of intention. In search of this intention Courts have at times wandered into regions of fancy but the rule itself has seldom been seriously questioned. It is also clear from the authorities that, in applying this rule Judges have uniformly accepted the view that in the absence of a contrary intention, express or implied in the agreement for sale, money paid by the purchaser to the vendor

(1) (1875) L.R. 10 Ch. App. 512.
(2) [1911] 2 Ch. 551.
(3) (1897) I.L.R. 19 All. 489.
(4) (1910) I.L.R. 33 All. 166.
(5) [1922] A.I.R. Calc. 104.
(6) (1884) 27 Ch. D. 89.
(7) (1918) I.L.R. 38 Mad. 178 F.B.

CIVIL.

1951.

Naresh Chandra Guha v. Ram Chandra Samonta

P. N. Mookerjee, J.

at the time of such agreement, be it described as earnest money or deposit or deposit money or by any other name is presumed to be earnest or security for the performance of the contract of sale liable to be forfeited if the contract fails by reason of default on the purchaser's part, in other words law raises in such cases an initial presumption in favour of the vendor clothing him with a right to forfeit the money the presumption however being rebuttable and the right defeasible by proof of a contrary intention, express or implied in the contract in question. This position is well illustrated by amongst others the English cases of *Depree* v. *Bedborough* (1), *Exparte Barrell* (2), *Collins* v. *Stimson* (3), *Howe* v. *Smith* (4), *Soper* v. *Arnold* (5), *Levy* v. *Stogdon* (6), *Sprague* v. *Booth* (7), *Hall* v. *Burnell* (8) and *Mayson* v. *Clouet* (9) and by the Indian decisions reported in the cases of *Bishan Chand* v. *Radha Kishan* (10), *Roshan Lal* v. *The Delhi Cloth and General Mills Co., Ltd.* (11), *Natesa Aiyar* v. *Appava Padayachi* (12), *Muhammad Habibullah* v. *Muhammad Shafi* (13), *Atul Chandra Kundu* v. *Sarat Chandra Laha* (14), *Mangobinda Dutta* v. *J. Baisogmaff* (15), *Chiranjit Singh* v. *Har Swarup* (16), *Nadiar Chand Guin* v. *Satis Chandra Sukal* (17), *Krisna Chandra Rudra Pal* v. *Khan Mamud Bepari* (18) and *Younie* v. *Tulsiram* (19) and the apparent conflict discernible between the said cases and the cases of *Palmer* v. *Temple* (20), *In re*: *Dagenham (Thames) Dock Co., Exparte Hulse* (21), *Ballabh*

(1) (1865) 4 Giff. 479.
(2) (1875) L.R. 10 Ch. App. 512.
(3) (1883) 11 Q.B.D. 142.
(4) (1884) 27 Ch. D. 89.
(5) (1889) 14 A.C. 429.
(6) [1899] 1 Ch. 5.
(7) [1909] A.C. 576.
(8) [1911] 2 Ch. 551.
(9) [1924] A.C. 980.
(10) (1897) I.L.R. 19 All. 489.
(11) (1910) I.L.R. 33 All. 166.
(12) (1913) I.L.R. 38 Mad. 178 F.B.
(13) (1919) I.L.R. 41 All. 524.
(14) (1920) 24 C.W.N. 967.
(15) [1922] A.I.R. Calc. 104.
(16) [1926] A.I.R. P.C. 1.
(17) (1927) I.L.R. 55 Calc. 638.
(18) (1935) 40 C.W.N. 659.
(19) [1942] A.I.R. Calc. 382.
(20) (1839) 9 Ad. & El. 508.
(21) (1878) 8 Ch. App. 1022.

*das* v. *Paikaji* (1), *Desu Rattamma* v. *Kakaraparthi* (2) and *Varadaraja* v. *Muniappa* (3) is easily explicable on the above statement of the rule. The test of reasonableness of the amount involved as laid down in the cases of *Manian Patter* v. *The Madras Railway Company* (4), *Singer Manufacturing Co.* v. *Raja Prosad* (5) and *Younie* v. *Tulsiram* (6) and *Cooper* v. *The London Brighton and South Coast Railway Co.* (7), is also in the ultimate analysis founded upon the same exposition of the rule, and, the disinclination of the Courts noticed above to differentiate between cases with and without clauses of forfeiture is also referable to the same and clearly consistent therewith. It is also to be remembered in this connection that between earnest money and part payment of price there is a fundamental distinction or difference in this respect and the rule of forfeiture has no application to money received as such part payment [vide *Ballabh Das* v. *Paikaji* (1), *Nawab Khaja Habibullah* v. *Arman Dewan* (8), *Varadaraja* v. *Muniappa* (3) and *Krishna Chandra Rudra Pal* v. *Khan Mamud Bepari* (9) and *Mayson* v. *Clouet* (10), see also *Cornwall* v. *Henson* (11) and *Halsbury's Laws of England, Second Edition, Vol 29, pp. 376-7, Art. 514*]. This distinction between earnest money and part payment of price does not appear to have been strictly observed in *Balvanta* v. *Bira* (12) and *Stiffles* v. *Martin* (13), but as the former was a case of part payment of price and the latter related to earnest money in the real sense of the term the actual decisions in those two cases are clearly justified.

It is necessary at this stage to refer to and explain the meaning and implication of an oft-quoted expression, first used by Fry L.J. in *Howe* v. *Smith* (14) and reproduced by him in his well-known treatise on specific performance. "That expression which runs as follows, namely as the deposit or earnest money is not

(1) (1916) 38 I.C. 915.
(2) (1927) 54 M.L.J. 40.
(3) (1929) 57 M.L.J. 785.
(4) (1905) I.L.R. 29 Mad. 118.
(5) (1909) I.L.R. 36 Calc. 960.
(6) [1942] A.I.R. Calc. 382.
(7) (1879) 4 Ex. D. 88 (92-93).
(8) (1919) 24 C.W.N. 40.
(9) (1935) 40 C.W.N. 659.
(10) [1924] A.C. 980 (986-7).
(11) [1900] 2 Ch. 208.
(12) (1897) I.L.R. 23 Bom. 56.
(13) (1934) 59 C.W.N. 174.
(14) (1884) 27 Ch. D. 89 (101).

CIVIL.

1951.

Naresh Chandra Guha v. Ram Chandra Samonta

P. N. Mookerjee, J.

merely a part payment but is then also an earnest to bind the bargain, so entered into, apparently indicated that the description of the characteristics of the earnest money, as given in the above statement of the golden rule of intention, is inaccurate that in any event it is incomplete and therefore unsafe to rely upon. The expression however if properly understood presents no such difficulty. It will appear from the authorities that deposit or earnest money, contemplated above has two characteristics—it is an earnest or security, it is also a part payment of the price but these two characteristics belong strictly speaking to two different stages. In the words of Lord MacNaughten in the case of *Soper* v. *Arnold* (1), the deposit serves two purposes if the purchase is carried out it goes against the purchase money but its primary purpose is that it is a guarantee that the purchaser means business." To the same effect is the decision of the judicial committee in the case of *Chiranjit Singh* v. *Har Swarup* (2), where their Lordships observe at page 2 of the Report that "earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through by reason of the fault or failure of the vendee." In the light of these high authorities the true meaning of the expression "not merely a part payment but also earnest or security" seems to me to be that, until the contract is performed the earnest money remains a security or earnest for performance of the contract of sale but it becomes a part payment of the price or purchase money immediately on such performance. The element of part payment remains that is how I read these authorities passive dorment till performance of the contract of sale and during this period it is completely dominated or overshadowed by the active or dominant element of earnest or security. In other words in the absence of a contrary intention, express or implied in the contract of sale the money is paid by the purchaser and received by the vendor as earnest or security and also as part payment in the sense that that it will become part of the purchase money in the event of performance of the contract of sale. That this is the true meaning of the expression used by Fry L.J. and quoted above appears from the context in which Fry L.J. used the said expression in the case of *Howe* v. *Smith* (3), where his preceding

(1) (1889) 14 A.C. 429 (435).

(2) [1926] A.I.R. P.C. 1.

(3) (1884) 27 Ch. D. 89.

words were as follows: "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed . . . . . The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract, to be that *in the event of the contract being performed it shall be brought into* account but if the contract is not performed by the payer it shall remain the property of the payee." This view is well confirmed by the observations of this court in the case of *Nawab Khaja Habibulla* v. *Arman Dewan* (1), which run at follows: "The deposit unless paid on any special terms is not merely part payment but is an earnest. *So that on the one hand if the contract be performed it is brought into account as part payment on the other hand if the purchaser make default it may be retained by the vendor.*"

The portions italicised above put the matter almost beyond controversy and sufficiently justify the view I have expressed above. Having thus explained in some detail the dual characteristics of earnest money and its peculiar position in relation to the rights of the parties to a contract of sale I shall now endeavour to examine the effect thereof upon the present case. In the *baina*, Exht. 1 there is admittedly no clause of forfeiture of the earnest money. Neither is there any contrary intention express or implied either in the shape of a clause for refund or return of the earnest money or otherwise, the stipulated price is Rs. 6,000/- and the earnest money amounts to Rs. 501/-, that is only about 8 per cent of the stipulated price. It cannot therefore be termed as unreasonable in any sense of the term and no implication of any contrary intention referred to above can be deduced even by applying the test of unreasonableness of the amount in question. In such circumstance there being no contrary intention express or implied in the contract in question the earnest money is in my opinion, liable to forfeiture in accordance with the principles discussed above and the petitioners second contention must therefore fail unless there be something in any statute or in any authoritative judicial pronouncement which clearly points to the contrary.

The statute requiring consideration is the Indian Contract Act and the judicial decision which has been relied upon by the learned Advocate for the petitioner is the Privy Council case

(1) (1919) 24 C.W.N. 40 (42).

CIVIL.

1951.

Naresh Chandra Guha.
v.
Ram Chandra Samanta.

*P. N. Mookerjee, J.*

of *Bhai Panna Singh* v. *Firm Bhai Abjan Singh* (1). I shall also refer to and to the extent that it may seem necessary deal with the cases reported in *Natesa Aiyar* v. *Appava Padaychi* (2) and *Ballabhdas* v. *Paikaji* (3), already cited and *Dinanath Damodar Kale* v. *Malvi Mody Ranchhoddas & Co.* (4), which have apparently some bearing on the question now before me. There is one other decision, namely, *Banku Behari Dhur* v. *J. G. Galstaun* (5), which has sometimes been forced into discussion as a relevant authority on the present question but in my opinion that decision has not even the remotest bearing on the present issue and I would content myself by merely pointing out that *Banku Behari's case* (5) had nothing to do with earnest money and dealt with a clear clause of penalty and rightly applied section 74 of the Indian Contract Act even if the purchaser there was guilty of default.

The relevant provisions of the Indian Contract Act are sections 64, 65 and 74, but any decussion on those sections in the present context ought in my opinion to be prefaced by some consideration of the nature and scope of the Indian Contract Act. It has often been ruled that the said Act is not exhaustive and does not encompass the whole law of contract in this country and does not rule out the applicability of established principles not opposed to justice, equity and good conscience to appropriate cases [vide *The Irrawaddy Flotilla Company* v. *Bugwandas* (6), *P. R. & Co.* v. *Bhagwandas* (7), *Jwaladutt R. Pillani v. Bansilal Motilal* (8), *Keshavlal* v. *Protapsing* (9), *Solomon* v. *Martin* (10) and *Gajanan* v. *Moreshwar* (11)]. This view is not in conflict with the decision reported in *Mohori Bibee* v. *Dharmodas* (12), which lays down that the Contract Act is exhaustive and even imperative *so far as it goes*. The dis-

(1) (1929) 33 C.W.N. 949.
(2) (1915) I.L.R. 38 Mad. 178 F.B.
(3) (1916) 38 I.C. 915.
(4) (1929) 32 Bom. L.R. 272.
(5) (1928) 27 C.W.N. 77.
(6) (1891) I.L.R. 18 Cal. 620 P.C.
(7) (1909) I.L.R. 34 Bom. 192.
(8) (1929) L.L.R. 53 Bom. 414 (P.C.).
(9) (1931) I.L.R. 56 Bom. 101.
(10) (1934) 39 C.W.N. 461 (467).
(11) [1942] A.I.R. Bom. 302.
(12) (1903) I.L.R. 30 Calc. 539 P.C.

tinction between these two classes of cases is sometimes thin but each has its own sphere of application and the limited scope of the Indian Contract Act as envisaged in the first series of decisions referred to above is perfectly reconcileable with the above decision in *Mohori Bibee's case* (1) or with the cognate rules of interpretation laid down by the Judicial Committee in *Ramdas* v. *Amerchand* (2), *Ramanandi* v. *Kalawati* (3) and *Chunna Mal* v. *Mool Chand* (4), to which Jack J. referred at page 473 in *Solomon's Case* (5), [See *Keshavlal* v. *Pratapsing* (6)].

It is necessary and useful to remember the above destination and limitation when considering the ambit and scope of particular sections of the Indian Contract Act. In cases of contract, therefore when any matter cannot be brought within particular provisions of the Indian Contract Act without doing some violence to the language used therein and/or without leading to strange and absurd results, that matter should in my opinion be left to be dealt with on established English principles, not inconsistent with justice, equity and good conscience.

Bearing in mind this aspect of the matter. I have examined sections 64, 65 and 74 of the Indian Contract Act in relation to the question, now before me and as a result of such examination, I am convinced that neither of those sections has any application of the determination of the said question.

Until the contract of sale is performed earnest money, as noticed above, is, in the absence of a contrary intention, just a security or earnest for the performance of that contract by the purchaser. It is liable to be forfeited if the contract fails by reason of default on the part of the purchaser (vide the cases already cited above) and the latter is entitled to its return or refund if the contract goes off for no fault on his part [vide *Levy* v. *Stogdon* (7), *Ibrahim* v. *Fletcher* (8) and *Karsondas* v

(1) (1903) I.L.R. 30 Calc. 539.
(2) (1916) L.R. 43 I.A. 104.
(3) (1927) I.L.R. 7 Pat. 221.
(4) (1928) I.L.R. 9 Lah. 510.
(5) (1934) 39 C.W.N. 461.
(6) (1931) I.L.R. 56 Bom. 101 (114).
(7) [1899] 1 Ch. 5.
(8) (1897) I.L.R. 21 Bom. 827.

CIVIL.

1951.

Naresh Chandra Guha.
v.
Ram Chandra Samonta

P. N. Mookerjee, J.

*Chhotalal* (1)]. The mere presence or absence of a clause of forfeiture in the contract of sale makes no difference [vide *Howe* v. *Smith* (2), *Hall* v. *Burnell* (3), and *Roshan Lal* v. *The Delhi Cloth & General Mills Co. Ltd.* (4) and the other cases already cited]. So long, therefore as the contract of sale is not performed, the rights of the parties with regard to the earnest money rest upon a contract distinct from the real or pure contract of sale a contract which may from its nature aptly be called a contract of security, (relating as it does to the security for the performance of the real contract of sale) evidenced by the covenants or term for forfeiture, or implied by law. This is strictly speaking no part of the real contract of sale and it needs performance or enforcement only when the real contract of sale is broken or goes off otherwise, where therefore, the contract of sale is broken by the purchaser and as a consequence, the earnest money is forfeited by the vendor, the forfeiture takes place under the express or implied contract of security which is strictly speaking no part of the real contract of sale. It may be called an ancillary contract in the words of White C.J. in *Natesa Aiyar* v. *Appava Padaychi* (5), but whatever the name it is strictly speaking no part of the real or pure contract of sale. It is also quite clear that when the contract of sale is broken by the purchaser, the vendor rescinds that contract, that is the real contract of sale and not the contract of security noticed above as otherwise no claim of forfeiture can arise. The benefit therefore that occurs to the vendor by such forfeiture is a benefit received by him not under the real contract of sale which alone is rescinded but under the contract of security which remains in force and under which the forfeiture is imposed and incurred (sections 64 and 65 of the Indian Contract Act). Although they must now be taken to deal also with the return of benefit and/or advantage received under contracts validly rescinded, [vide *Muralidhar* v. *International Film Co. Ltd.* (6)], can therefore, have no application to the cases under consideration.

At to section 74 it is enough to say that by its very terms it is inapplicable to cases of earnest money which is an amount paid

(1) (1923) I.L.R. 48 Bom. 259.
(2) (1884) 27 Ch D. 89.
(3) [1911] 2 Ch. 551.
(4) (1910) I.L.R. 33 All. 166.
(5) (1915) I.L.R. 38 Mad. 178 F.B.
(6) [1943] A.I.R. P.C. 34 (38, 39).

really under the contract of security as named above and there is no question of any breach of that contract or of any amount payable on such breach at the time of the making of the contract of sale and is not, at any rate an amount *named in the contract of sale to be paid as compensation on breach thereof.* It is to be remembered, further that forfeiture of earnest money is not in the nature of damages or compensation for breach of contract (see *Halsburys Laws of England, second edition, Vol. 29, p. 378, Art. 517*). Sec. 74 of the Indian Contract Act cannot therefore be attracted to such cases without doing violence to the language used therein. It may also be pointed out in this connection that application of section 74 to cases of earnest money would, in many instances lead to strange and absurd consequence. This would be apparent if we remember that usually earnest money is small (See in this connection the observations in *Ballabh Das* v. *Paikaji* (1), where the origin and nature of earnest money is discussed at some length) and that if earnest money be taken to be "the sum named in the contract as the amount to be paid in case of its breach," within the meaning of section 74, as it must necessarily be if section 74 is to be held applicable to cases of earnest money, the vendor, whatever his losses for breach of the contract by the purchaser, would not be able to recover any compensation beyond the earnest money which would be in view of the terms or provisions of the said section, the maximum compensation recoverable by him in other words that the vendor whatever his losses would in many instances be limited to a small compensation. A strong situation would thus be created the absurdity whereof even apart from any question of unjustness or injustice, would at once be manifest.

In the above state of things and as there is nothing compelling in its favour either in the statute or in principle or in the authorities I am not inclined to subscribe to the view that section 74 of the Indian Contract Act applies to cases of earnest money. I am unable therefore to agree with the opinion expressed by Sadasiva Aiyar J. in his dissentient judgment in the case of *Natesa Aiyar* v. *Appava Padaychi* (2) and on the whole, I respectfully agree with the views expressed by White C.J. and Miller J. in *Natesa's case* (2) and by the learned Judges of the Bombay High Court in the case of *Dinanath*

(1) (1916) 38 I.C. 915 (921).
(2) (1915) I.L.R. 38 Mad. 178 F.B.

CIVIL.

1951.

Naresh Chandra Guha v. Ram Chandra Samonta

P. N. Mookerjee, J.

*Damodar Kale* v. *Malvi Mody Ranchhoddas & Co.* (1). I hold accordingly that section 74 cannot be invoked by a defaulting purchaser to resist in any manner or to any extent whatsoever the vendor's claim for forfeiture of the earnest money. I have explained above why section 64, 65 and 74 of the Indian Contract Act would not apply to cases of earnest money. To the reasons already given I would like to add one more consideration.

It is clear from the Indian authorities, cited above, that notwithstanding the presence of the said section 64, 65 and 74 on the statute book for all this time the law as laid down in the English case of *Howe* v. *Smith* (2), has been followed and applied in this country for over half a century. It is clear also that there is nothing in that law which is opposed to justice, equity or the good conscience. That law should therefore be left undisturbed on principles of stare decisis vide *Dinanath* v. *Malvi* (1).

From the above discussion the view emerges that sections 64, 65 and 74 of the Indian Contract Act are inapplicable to cases of earnest money. This view is not in any way inconsistent with or affected by the decision of the Judicial Committee in *Bhai Panna Singh* v. *Firm Bhai Abjan Singh* (3), (which I shall presently discuss) or with the case of *Ballabh Das* v. *Paikaji* (4), where the learned judges point out at page 922 of the report that "the principles applicable to earnest money . . . . . cannot rightly be applied to" part payments of price thus recognising the liability of earnest money to forfeiture upon the purchaser's default. This latter case was dealt with as a case of part payment of price or purchase money and the observations there on sections 64, 74 etc. of the Indian Contract Act must be read as limited to such cases.

It now remains for me to consider the decision of the Judicial Committee in the case of *Bhai Panna Singh* v. *Firm Bhai Abjan Singh* (3). That case to my mind contains nothing which conflicts with the views which I have expressed above. It is clear from the report that in that case there was a clause providing for damages to the extent of Rs. 10,000/- against the

(1) (1929) 32 Bom. L.R. 272.
(2) (1884) 27 Ch. D. 89.
(3) (1929) 33 C.W.N. 949.
(4) (1916) 38 I.C. 915.

defaulting party and the whole controversy really centred round the claim for such damages. There was however also in that case payment of earnest money of Rs. 501/- subject to a clause of forfeiture, and seems to me that Gentle J. was not strictly correct in saying in the case of *W. J. Younie* v. *Tulsiram Jankiram* (1), that in the above case before the Judicial Committee no sum was payable as earnest money or as security or guarantee for performance of the contract. Apparently Gentle J. had in mind only the clause referred to above providing for damages against the defaulting party and his attention was not drawn to the clause about the earnest moneys. The purchaser in the case before the Judicial Committee was found guilty of breach of contract and the vendor was held entitled to damages but the Judicial Committee, although they referred several times to the forfeited earnest money no where expressed themselves against the legality of this forfeiture made by the vendor. It is true that the Judicial Committee applied section 74 to the facts of that case but that application to my mind was limited to the clause noticed above which provided for payment of damages and by applying section 74 the Judicial Committee scaled down the amount of such damages to what appeared to them to be in the circumstances of that case reasonable compensation. It is true also that in calculating the net amount of reasonable compensation their Lordships took into account the forfeited earnest money, but that is clearly explicable on the principle of assessment of reasonable compensation in such cases [vide *Icely* v. *Grew* (2), and *The Vellore Taluk Board* v. *Gopalasami Naidu* (3), and vide also *Halsbury's Laws of England, Second Edition, Vol. 29, p. 378, Article 517*]. In the absence of any clear pronouncement against the legality of the forfeiture of the earnest money. I am not inclined to construe this decision of the Judicial Committee as an authority against such forfeiture. Such construction would not only interfere with a long series of Judicial decisions in this country, but would also be in conflict with the Judicial Committees own decision noticed above namely that reported in *Chiranjit Singh* v. *Har Swarup* (4). I am not prepared to hold

(1) [1942] A.I R. Calc. 382.
(2) (1856) 6 Nev. & M. (K.B.) 467.
(3) (1914) I.L.R. 38 Mad 801.
(4) [1926] A.I.R. P.C. 1.

CIVIL.

1951.

Naresh Chandra Guha
v.
Ram Chandra Samonta

P. N. Mookerjee, J.

that the Judicial Committee meant without an express word and there is no scope in the light of what I have said above also for any necessary implication to overrule the rule of law uniformly laid down in a series of decisions in this country and unsettle the settled law which has been followed and applied here almost without demur for over half a century notwithstanding the Indian Contract Act and the presence of the above quoted sections therein.

As a result of the above discussion, I have come to the conclusion that the earnest money in the real sense of the term, as explained above is in the absence of a contract to the contrary either express or implied liable to be forfeited by the vendor when the contract goes off for default on the part of the purchaser and such liability exists notwithstanding sections 64, 65 and 74 of the Indian Contract Act and is not affected by any of the said provisions although, when the vendor sues the purchaser for compensation for breach of the contract in the matter of assessment of such compensation, the forfeited earnest money has to be taken into account and there the purchaser would get credit for the same.

In the above view of the matter the second contention raised on behalf of the petitioner also fails and is accordingly overruled.

The result, therefore, is that this rule is discharged, but having regard to the circumstance, I direct that the parties would bear their own costs throughout.

S.D.G.

*Rule discharged.*

## ORIGINAL CIVIL.

*Before Mr. Justice S. R. Das.*

CIVIL.

1947.

*March, 26.*

## KHUSIRAM BANARSHILAL
*v.*
## KIAN GWAN CO. (CAL.) LTD.*

*Arbitration—Dispute over extension of time for supply as originally fixed—If such subsequent agreement governed by arbitration clause in the original contracts—Circumstances under which subsequent agreements are governed.*

Contracts containing arbitration clause to the effect that all matters, questions, disputes, differences and/or claim arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute shall be referred to arbitration, includes sufficiently any subsequent agreement for enlarging or extending the time for performance of the original contracts and a dispute arising therefrom attracts the arbitration clause.

*Turnock* v. *Sartoris* (1); *Ramdas Dwarkadas* v. *Orient Pictures* (2), distinguished.

*Wade-Gray* v. *Morrison* (3) referred to.

*Query*:—Whether extention of time must be a matter of an agreement or may result from an unilateral forbearance under section 63 of the Indian Contract Act or whether a new agreement for extension will operate to supersede the original contract displacing the arbitration clause—not discussed.

Application by Khusiram Banarshilal for an order determining the scope and affect of two arbitration agreements dated the 4th and 7th January, 1946 and for an order that the Bengal Chamber of Commerce have no jurisdiction to arbitrate with regard to disputes that have arisen.

The material facts will appear from the judgment.

* Application for an order determining the scope and affect of two arbitration agreements.

(1) L.R. 43 Ch. D. 150.
(2) [1942] I.L.R. Bom. 759.
(3) 87 L.T. (N.S.) 270.

CIVIL.

1947.

Khushram, Banarshilal v. Kian Gwan Co. (Cal.) Ltd.

*March, 26.*

*Mr. N. C. Chatterjee* for the Petitioner.

*Mr. P. B. Mukharji* for the Respondent.

The judgment of the Court was as follows:—

**S. R. Das, J.:**—This is an application on the part of Banarshilal for an order determining the scope and effect of two arbitration agreements dated the 4th and 7th January, 1946, and for an order that the Bengal Chamber of Commerce have no jurisdiction to arbitrate with regard to the disputes that have arisen between them and Kian Gwan Co. (Cal.) Ltd., relating to the alleged separate verbal agreements for the extension of due dates and that the said disputes do not fall within the scope of the said arbitration agreements. The application arise out of the following facts:—

By two several contracts in writing bearing numbers 8863 and 8903 and dated the 4th and 7th January, 1946, respectively Khushiram Benarshilal (hereinafter called the applicants) sold to Kian Gwan Co. (Cal.) Ltd. (hereinafter called the respondents) 3 lacs yards of Hessian under each of the contracts, delivery April/May/June, 1946, at the rate of 1 lac yards per month at rates and upon terms contained in those contracts. Each of the said contracts which were in the Indian Jute Mills Association form of contracts contained the following clauses:—

> 13. All matters, questions, disputes, differences and/or claim arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted.
>
> 14. Additionally the respective rights and obligations of the parties shall in respect of all other pending or future contracts between them, be such as if the preceding clauses were specifically included in such contracts.

April and May portion of the goods under both of the contracts were delivered by the applicant although not within the original due dates but sometime after the due dates. The June portion of the goods under neither of the contracts was delivered on the due date. I find however, that on the 5th July 1946 the respondents gave to the applicant shipping instructions under contract No. 8863 for placing 20 bales of 2,000 yards each alongside S. S. Exchester for shipment to New York on the 25th July, 1946. There was a reminder from the respondents to the applicants on the 15th July 1946 to place the goods alongside in due time in terms of the contracts. On the 19th July, 1946, the respondents cancelled the shipping instructions alleging that they understood that the applicants were not in a position to bring down the above goods alongside. There was no reply from the applicants and indeed there was no correspondence between the parties until the 15th October 1946. On that date Messrs. Fox & Mandal, Attorneys for the respondents wrote a letter to the applicants demanding delivery of the outstanding 2 lacs yards under the said contracts Nos. 8863 and 8903 and threatening that the respondents could buy against the applicants. It was alleged that the applicants, had failed to deliver the 2 lacs yards deliverable in June under the said contracts and "at your request the time for delivery was from time to time extended till the 15th October 1946." The applicants replied on the 17th October, 1946, contending that the respondents could not buy on account of the applicants as the due date had long gone past and denying having made any arrangement for extension of the due date. On the 19th October, 1946, Messrs. Fox & Mandal sent a rejoinder reiterating the case of extension of due date from time to time up to the 15th October 1946. The applicants on the 21st October, 1946, referred Messrs. Fox & Mandal to their letter of the 17th October, 1946. On the 23rd October, 1946, the respondents wrote informing the applicants that it had bought the outstanding goods from Messrs. Cartwright & Co., and had suffered a loss of Rs. 26,312/8/- as per particulars set out in the letter. The respondents called upon the applicants to send a cheque for that amount at the latest by the 26th October, 1946. Evidently no payment was made and on the 29th October, 1946, the respondents referred the disputes to the Bengal Chamber of Commerce the proceedings had before the Chamber of Com-

CIVIL.

1947.

Khusiram Banarshilal v. Kian Gwan Co. (Cal.) Ltd.

*S. R. Das, J.*

merce and the correspondence between the Registrar of Tribunal of Arbitration and the respondents are summarised in the form of a list of dates in the affidavit in opposition. It also appears from the petition that six statements were filed by the parties, namely four by the respondents and two by the applicants. The six statements are annexed to the petition. It appears that the first statement filed by the applicants was headed "counter statement of facts of Messrs. Khushiram Banarshilal against the statement of Messrs. Kian Gwan Co. (Cal.) Ltd." In the first "counter statement" dated the 6th December, 1946, the applicants denied having ever extended the due date and commented on the absence of particulars of the alleged extension in the statement of the respondents. It also expressed the "desire to adduce oral evidence and to cross examine through their legal advisers the witnesses whom the applicant should be called upon to produce in order to provide the alleged verbal agreements." They took the point under section 35 of the Sale of Goods Act, that the respondents did not apply for delivery and consequently the respondents were not even entitled to any difference between the contract price and market price on 30th June, 1946. It was alternatively submitted that if it be held that the respondent was not bound to ask for delivery and the applicants were bound to deliver without being asked, the applicants were only liable to pay differences on the basis of the fixed maximum rate prevailing on the 30th June, 1946. This "counter statement" concluded as follows:—

> "7. Lastly, the respondents submit that the present reference is only an attempt to realise a heavy difference owing to the abnormal rise in the price of the goods after the lapse of the ordinance fixing the maximum price and consequently the reference should be dismissed with costs."

In the "Further Counter-Statement of facts" dated the 17th December, 1946, the applicants pleaded to the further statement filed by the respondents on the 10th December, 1946, in detail on the merits. They reiterated their denial of extension, commented on want of particulars thereof and insisted on cross-examination of the witnesses. This "further counter-statement of facts" concluded with the following paragraph:—

"(d) With regard to the statements made in paragraph 4 of the "Recapitulation" the respondents admit that the applicants are not entitled to an Award as claimed by them. If the learned Arbitrators hold inspite of section 35 of the Sale of Goods Act that the respondents were in default, the applicants were not entitled to any Award except the difference between the contract price and the fixed maximum due date price The respondents are advised not to deal with the unnecessary and undignified remarks and expressions again used in this paragraph."

The respondents replied to the "Further counter-statement" on the 23rd January 1947 and the applicants were called upon to state their comments thereon by the 29th January 1947. Messrs. Leslie & Hinds, Attorneys for the applicants, objected to statement after statement being filed but asked for sufficient time to file their reply. On the 29th January 1947 time was allowed to them to do so up to the 5th February 1947. On the 31st January 1947 the arbitration was fixed for the 7th February 1947. On the 3rd February, 1947 the present notice of motion was taken out for the determination of the scope and effect of the arbitration clauses in the said two contracts, the applicants contending that they did not cover the disputes relating to the alleged extension of the due dates and that the Bengal Chamber of Commerce had no jurisdiction to adjudicate upon the said disputes.

Mr. N. C. Chatterjee appearing in support of the application contends that the respondents' case that there were extension of the due dates from time to time amounts to saying that there were oral agreements from time to time for extension of time. These alleged agreements for extension being independent agreements subsequently entered into are not governed by the arbitration clause in the original contracts. He relies strongly on the case of *Turnock* v. *Sartoris* (1) which was followed by Blackwell J. in *Ramdas Dwarkadas* v. *Orient Pictures* (2). In the English case there was first a lease with an arbitration clause. Subsequently disputes having arisen another agreement in writing was entered into between the parties without any arbitration clause. This second agreement imposed some fresh liabilities on the lessor in certain ways. Disputes arose between the parties as to their rights under both the lease and the agreements. The lessee

(1) L. R. 43 Ch. D. 150.
(2) [1942] I. L. R. Bom. 759.

CIVIL.

1947.

Khusiram Banarsilal
v.
Kian Gwan Co. (Cal.) Ltd.

*S. R. Das, J.*

having filed a suit in respect of all the disputes the lessor applied for stay of the suit. The question was whether the arbitration clause in the lease was applicable also to disputes under the agreement. The contention of the defendant was, on the authority of *Wade-Gray* v. *Morrison* (1) that the two agreements, must be treated as together forming one agreement so that the arbitration clause would apply to all disputes. The Court repelled the contention. *Wade Gray* v. *Morrison* (1) was distinguished as a case where the two agreements were contemporaneous and could be construed as constituting one agreement. It was pointed out that subsequent agreement, which imposed fresh liability on the lessor and modified the rights of the lessee, could not be treated as part of the lease. Thus in that case there were admittedly a lease and an agreement one after another. There was no dispute as to the factum of either of them. Each of them created rights and liabilities which were not to be found in the other. In these circumstances the Court could not treat them as one agreement. Then the Court examined the arbitration clause and on a construction thereof came to the conclusion that the arbitration clause simply referred to question arising under the lease alone and did not extend to all questions arising as to property included in the lease. In the Bombay case also there were two agreements one after another, the first alone containing an arbitration clause. The second agreement created new rights and liabilities which were not to be found in the first. A third party was concerned in the second agreement. The Bombay High Court following the English case held that the two agreements could not be treated as one and the arbitration clause in the first agreement did not cover the disputes arising under the second agreement and in the result refused to stay the suit. The position before me is entirely different. Here there are not two agreements at all and disputes do not arise under two agreements. The disputes here is whether the time for delivery under the admitted contracts has been extended, the respondents alleging that it has been and the applicant maintaining the contrary. The question before me is whether the disputes as to extension or no extension of the due date under the contracts come within the purview of the arbitration clauses contained in those contracts. The contracts prescribed a period of delivery of the goods. The buyer is alleged that the term of the contracts

(1) 37 L. T. (N. S.) 870.

was modified but the seller disputes that allegation. The seller contends that the breach on his part, if any, was on the due date originally fixed by the contracts but the buyer insists that the contracts were kept alive by extension. Those are the disputes. The question whether those disputes are covered by the arbitration clause must depend for its answer on the language and in the arbitration clause. They directly arise "out of" or "concerning" or in "connection with" or "in consequence of" or "relating to" the contracts and, therefore, are clearly within the arbitration clause. Here the disputes do not arise under an admittedly concluded new agreement and, therefore, the question which was material in the two cases relied on by Mr. Chatterjee does not arise or call for any consideration at all in this case. In my judgment the arbitration agreement (clause 13) is wide enough to cover these disputes. In this view of the matter the interesting question whether extension of time must be matter of an agreement or may result from an unilateral forbearance under section 63 of the Indian Contract Act or whether a new agreement for extension of time will operate to supersede the original contract and along with it displace the arbitration clause need not be discussed in this case. On a proper construction of the contracts the disputes are within the arbitration agreement (clause 13) and, therefore, the Bengal Chamber of Commerce have ample jurisdiction to entertain the reference and to adjudicate upon the disputes.

I have referred to the statements and counter statements filed by the parties before the arbitrators. The language used in them and specially in the counter statements filed by the applicants clearly evinces an intention on the part of both parties to go to arbitration of the Bengal Chamber of Commerce. I find no difficulty in treating those statements and counter statements as constituting an arbitration agreement within the meaning of the Indian Arbitration Act as well as a reference and submission to the jurisdiction of that arbitral tribunal.

Mr. Mukherjee also relied on clause 14 of the contract which makes all the preceding clauses including the arbitration clause applicable to all pending or future contracts. Mr. Mukherjee contends that even if extension of the due date is to be regarded as a separate contract the arbitration clause (Clause 13) must, by virtue of clause 14, attach hereto. It seems to me that the word

CIVIL.
1947.
Khushram Banarsilal
v.
Kian Gwan Co. (Cal.) Ltd.
S. R. Das, J.

"contract" in clause 14 refers to a contract for sale or purchase to which the preceding clauses may properly be applied and not to a mere contract for extension of time. I do not, therefore, base my decision on this clause.

The result, therefore, is that I hold and declare that on a proper construction of the arbitration clauses in the two contracts the disputes as to extension of the due dates thereunder are within the purview of those clauses and the Bengal Chamber of Commerce have jurisdiction to arbitrate upon those disputes under those arbitration clauses and also under the arbitration agreement implied in or constituted by the statement of fact and the counter statement of facts filed by the parties. The applicants must pay the costs of this application.

*Messrs. Leslie and Hinds :* Solicitors for the Petitioner.
*Messrs. Fox and Mondal :* Solicitors for the Respondents.

S. D. G. *Application dismissed.*

## CIVIL REVISION.

*Before Mr. Justice G. N. Das.*

CIVIL.
1951.
*August, 17.*

KRISHNA KHANDELWAL AND ANOTHER

*v.*

DIRECTOR OF LAND HIRING ETC., AND OTHERS.*

*Constitution of India, Art. 226 (1). application under—Procedure relating to affidavits—High Court Appellate Side Rules.*

*Prerogative writs—Art. 226 (1) of the Constitution of India—If can be issued by the High Court against Union of India being outside territorial jurisdiction.*

*Requisitioned Land (Continuance of Powers) Act, 1948—Sec. 3—If affects continuance of requisitions made under previous legislations and ordinances Act and if* ultra vires *the Articles 14 and 31 of the Constitution.*

There is no specific rule requiring the applicant to swear the affidavit himself. Adherence to such requirements may lead to complexities.

Rule 43 Chap. II part II of the Appellate Side Rules and Rule 6 of Or. 35 of the Supreme Court noticed.

*Civil Revision Case No. 595 of 1951.

CIVIL.

1951.

Krishna Khandelwal v. Director of Land Hiring etc.

*P. K. Banerjee* v. *L. J. Siesenda* (1) distinguished.

No relief can be granted under Art. 226 *(4)* against the Union of India.

*Lloyds Bank Ltd.* v. *The Lloyds Bank Indian Staff Association* (2) followed.

Requisitioned Land (Continuance of Powers) Act expressly provide that requisitions made shall continue; it means that the old requisition continues in force without any fresh order under the different statutes. The statutes, having been passed 18 months before the Constitution came into force, is saved by Articles 31(5) and 31(6) of the Constitution. The Act did not contravene Art. 31 of the Constitution nor it is void under Art. 14.

Application under Article 226 (1) of the Constitution by the Petitioners who are residents of premises No. 3 Ashutosh De Lane in the City of Calcutta.

The material facts will appear from the judgment.

*Messrs. Amaresh Chandra Roy* and *J. M. Banerjee* for the Petitioners.

*Messrs. E. R. Meyer*, *B. L. Pal* and *Jajneswar Majumdar* for the Opposite Parties.

The judgment of the Court was as follows :—

*August, 17.*

**G. N. Das, J.** :—This Rule was obtained by the petitioners calling upon the opposite parties to show cause why a writ in the nature of mandamus should not be issued and possession of the premises mentioned in the petition should not be restored to the petitioners or such other or further order should not be made as to this court may seem fit and proper.

The petitioners are two ladies who are residents of No. 3 Ashutosh De Lane in the city of Calcutta. The opposite parties to the Rule are (1) Director of Land, Hirings and Disposal, Eastern Command, (2) Assistant Director of Land, Hirings and Disposal, Eastern Command, (3) State Manager, Government of India States, Calcutta Area, (4) Land Acquisition Collector, Calcutta, and (5) Post Master General, Bengal Circle.

The petition was supported by an affidavit of Chandalal Khandelwal, husband of petitioner No. 2. The Counter-affidavit on behalf of the opposite parties was sworn to by opposite party

(1) [1947] A. I. R. Calc. 307.

(2) Unreported judgment of The Calcutta High Court dated 17. 1. 51.

CIVIL.

1951.

Krishna Khandelwal v. Director of Land Hiring etc.

G. N. Das, J.

No. 3. The further affidavit on behalf of the petitioners was also sworn to by Chandalal Khandelwal husband of petitioners No. 2.

The premises in respect of which the dispute has arisen is plot No. 352 Southern Avenue Extension. The area of the said plot is 47 cottas out of which 17 cottas is alleged to be covered with buildings. The petitioners are the owners of the said premises. On the 8th of May, 1943, the aforesaid premises were requisitioned under rule 75 (a) of the Defence of India Rules and the petitioners were directed to place at the Disposal of the Additional Land Acquisition Collector the said premises from the 20th May, 1943. In pursuance of the said requisition possession of the said premises was delivered to the Land Acquisition Collector on the 25th of May, 1943. The premises were derequisitioned on the 3rd of July, 1943. On the 19th of October, 1943, the petitioners submitted a bill claiming compensation to the tune of Rs. 16,555.

On the 11th of March 1944, the said premises were again requisitioned under rule 75 (a) of the Defence of India Rules. The petitioners allege that the premises were placed in the possession of the military authorities and thereafter they are in the possession of the employees of the Postal Department who have shifted to West Bengal from East Pakisthan. It may be noted that the bill which was submitted by the petitioners claiming Rs. 16,555 was settled for a sum of Rs. 1200. The petitioners allege that this settlement was not a voluntary one. On the 30th of May 1945, the petitioners entered into an agreement with the Government that the latter would remain in possession of the said premises for the period of the requisition and a sum of Rs. 600 per month was settled as the compensation to be paid to the petitioners for the occupation by the Government. On the 19th of May 1949 and thereafter there are demands by the petitioners for payment of adequate compensation. The petitioners allege that these demands were unheeded by the opposite parties. The petitioners therefore allege that they have made a demand for justice and that they have accordingly made this application under Article 226 (1) of the Constitution.

Mr. Ray appearing on behalf of the petitioners has raised several contentions. In the first place, he contends that there should have been a fresh order made under the different legislations

extending the operation of the Defence of India Act for requisitioning the premises. He also contends that the requisition of the premises was a *mala fide* one. He also contends that the impugned legislation, namely, the Requisitioned Land (Continuance of Powers) Act, 1948, (Act XVII of 1947) is void of the constitution under Article 31 thereof. He also contends that the said Act is void under Article 14 of the Constitution.

On behalf of the opposite parties Mr. Meyer has raised certain preliminary objections. In the first place, he contends that the Union of India on whose behalf the requisition was made was a necessary party to the application. In the second place, he contends that assuming that the Union of India is a necessary party this Court has no jurisdiction under Article 226 (1) of the Constitution to issue the writs prayed for. He also contends that the petition should be thrown out on the ground that it is not supported by the affidavit of any of the petitioners. I shall deal with these preliminary contentions after I have disposed of the contentions raised on behalf of the petitioners.

As regards the first contention raised by Mr. Ray, it is not disputed that the powers to requisition the premises for the purposes for which they were requisitioned have been continued by successive Legislations passed since the expiry of the Defence of India Act. The Defence of India Act (Act XXXV of 1939) expired six months after the official termination of it served by Requisitioned Land (Continuance of Powers) Ordinance, 1946. The Power was further continued by the Requisitioned Land (Continuance of Powers) Act 1948 (Act XVII of 1947). The question which has been urged is that on every occasion that the Power was continued by the different Acts, a fresh order of requisition was necessary and in the absence of such orders the opposite parties had no right to continue in possession and their possession must be deemed to be that of trespassers.

Section 3 of the Requisitioned Land (Continuance of Powers) Act, 1948 runs as follows :—

"Notwithstanding the repeal of the Defence of India Act, 1939, (Act XXXV of 1939) and the rules made thereunder and the repeal of the Ordinance of 1946 (XIX of 1946), all requisitioned lands shall continue to be subject to requisition until the expiry of this Act and the appropriate government may use or deal with any

CIVIL.

1951.

Krishna Khandelwal v. Director of Land Hiring etc.

G. N. Das, J.

requisitioned land in such manner as may appear to be expedient, provided that the appropriate government may at any time release from requisition any requisitioned land."

The section expressly states that the requisition made shall continue which means in my opinion, that the old requisition continues in force without any fresh order made under the different statutes. The operation of the requisition which was made under the Defence of India Rules in 1944 must therefore be deemed to have continuous operation in spite of the fact that the power of requisition was conferred by different legislative enactments and ordinances from time to time. The first contention raised by Mr. Ray must therefore be overruled.

The second contention raised concerns the *mala fides* of the opposite parties in requisitioning the premises for the second time. It is pointed out that the compensation which was awarded by the opposite parties for the period of the first requisition was unduly low. It was also pointed out that the petitioners have been compelled to agree to a monthly payment of Rs. 600 as compensation in spite of the fact that the premises in question cover an area of 47 cottas Southern Avenue Extension and the built up area measures 17 cottas. It is also pointed out that the opposite parties have been unnecessarily delaying compliance with the demands made for refixing the amount of compensation. It is also pointed out that clause 5 which contains an agreement to refer disputes to arbitration is unmeaning and oppressive because the clause confers on the Government the power of the nominating an arbitrator which means that the Government may refuse or may make unreasonable delay in appointing the arbitrator and the arbitrator would be person to be nominated by the party liable to pay compensation.

On behalf of the opposite parties the allegations of *mala fides* and unnecessary delay and the presence of an improper motive in requisitioning the premises once again have been denied. The Rule which was issued by this Court merely refers to the prayer of the petitioners for the derequisitioning of the premises. No Rule was issued as regards the amount of compensation to be paid in respect of the premises. The mere fact that there has been delay in refixing the compensation is not sufficient to show that the opposite parties were actuated by an improper motive. The allegation that the petitioners were compelled to accept a small

sum as compensation for the period of the first requisition has been traversed on behalf of the opposite parties. In these circumstances in my opinion the petitioners have failed to discharge the burden which rested on them to show *mala fides* on the part of the opposite parties. The second contention raised on behalf of the petitioners must also be overruled.

The third contention raised by Mr. Roy concern the validity of the impugned legislation. It is contended that the impugned legislation is void of Article 31 of the Constitution because the effect of the requisition is to deprive the petitioners of the possession of their lands. It cannot be disputed that Article 31(1) of the Constitution has not been transgressed because possession has been taken under a valid piece of legislation. Article 31 (1) of the Constitution merely says that no person shall be deprived of his property save by authority of law. Nor has Article 31 (2) of the Constitution been contravened. The impugned legislation was passed more than 18 months before the Constitution came into force. It is therefore saved by the Article 31 (5) and 31 (6) the Constitution. This contention must therefore be overruled.

It is further contended that the impugned legislation is void of Article 14 of the Constitution. Article 14 of the Constitution states that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This means that every person has a right to protection of equal laws. It is not suggested that the impugned legislation suffers from this defect. What is contended for is that in the matter of the requisition of the disputed premises the local officer have discriminated the petitioners from other persons owning lands near about. This cannot be regarded as discrimination within Article 14 of the Constitution. This contention must also be overruled.

It now remains for me to consider the preliminary objections raised by Mr. Meyer. It is first contended that the Union of India must be made a party to these proceedings. The question as to the parties on whom these prerogative writs can be issued depends largely on the practice which prevailed before the Constitution came into force. The matter is dealt with in Short and Mellor. "The practice of the crown office". It is obvious that the writs should be served on all persons interested in supporting the legal process which was the occasion for the petitioners seeking relief under Article 226 (1) of the Constitution. It does not

CIVIL.
1951.
Krishna Khandelwal
v.
Director of Land
Hiring etc.
G. N. Das, J.

appear that in the present case the petitioners cannot get adequate relief by a direction on the opposite parties. The order of requisition was made by the Land Acquisition Collector, Calcutta. It is not clear as to whether the requisition was made on behalf of the Union of India but even so, in my opinion this may be a ground for issuing a further notice on the Union of India.

It is also contended by Mr. Meyer that no relief can be granted under Article 226 as against the Union of India because the Union of India is not located within the jurisdiction of this Court. This matter has been answered in favour of the Union by a Bench of this Court in the matter of *case reported under Ch. V. Rule 3* of the Original Side Rules and in the matter of *Lloyds Bank Ltd.* v. *The Lloyds Bank Indian Staff Association (Calcutta Branches)* (1). It is also contended that the petition should be thrown out on the ground that it is not supported by the affidavit of the petitioners. Reference was made to the case of *P. K. Banerjee* v. *L. J. Simonds* (2). The decision relied on is a Bench Decision of this Court and concerned an application under section 45 of the Specific Relief Act. The Bench was of the opinion that the petition in that case which was supported by an affidavit of the manager of the petitioners, one on which the Rule was issued did not fulfil the statutory requirements of section 46 of the Specific Relief Act. The Bench also held that the defect was not cured by the fact that the affidavit in reply was sworn to by the petitioner himself. That case however is distinguishable from the facts of the present case. That was a case which related to a subject matter which was situated within the Ordinary Original Jurisdiction of this Court. Sec. 46 of the Specific Relief Act was therefore attracted. It is not necessary for me to consider whether the procedure which was held to be obligatory in that case would have to be followed in applications under Article 226 (1) of the Constitution.

This is a matter with which I am not concerned. In the present case the disputed property is situate in Southern Avenue Extension. The requisition was made of that property. The subject matter in dispute is therefore property which is outside the Ordinary Original Jurisdiction of this Court. The prayer for derequisition and restoration of possession has also to be complied

(1) Unreported judgment of the Calcutta High Court dated 17. 1. 51.
(2) [1947] A. I. R. Cal. 307.

with at a place outside the said jurisdiction. The question therefore arises whether in such cases the petition must be supported by the affidavit of the persons swearing (making?) the petition. Rule 43 Chapter II, Part II of the Appellate Side Rules lays down that the Procedure in applications on the Appellate Side must conform to the Procedure which is adopted in Civil Revision cases on the Appellate Side. There are no specific rules on the Appellate Side which require that the petition should be supported by the affidavit of the petitioners themselves. The rules of the Supreme Court, 1950 do not lay down that the affidavit supporting a petition under Article 32 of the Constitution must be sworn to by the petitioners themselves. Rule 6 of Order XXXV of the Rules of the Supreme Court, 1950 merely says that the application for a writ under Article 32 shall be supported by an affidavit. It does not state that the persons swearing the affidavit must be the petitioners themselves. A strict compliance with these requirements may lead to complexities. The petitioner may be a corporation or the petitioner may be a person who is illiterate deaf and dumb in which case it would be impossible for the petitioner to strictly comply with the requirements contended for. In such cases even in an application under section 45 of the Specific Relief Act the rule was relaxed if the petitioners sufficiently explained the reason for their inability to verify the petition. In these circumstances I am of the opinion that the affidavit of the husband to one of the petitioners is a valid compliance with the requirements of the law. This objection in my opinion cannot be given effect to.

I have already held that the petition fails on the merits.

The Rule is accordingly discharged with costs to the appearing opposite parties, hearing fee being assessed at five gold mohurs.

S. D. G. *Rule discharged.*

*Before Mr. Justice T. J. Y. Roxburgh.*

CIVIL.
1951.
*June, 8.*

LANKESWAR HALDAR AND ANOTHER

*v.*

RAM GOPAL NASKAR AND OTHERS.*

*Bengal Agricultural Debtors Act (VII B. C. of 1936), section 37 A—Application for relief by one co-sharer within prescribed time—Application not in prescribed form—Subsequent application in proper form but after time—Application by other co-sharers—Withdrawal of the application by the first applicant—Subsequent applicants, if can get benefit of the application by the former applicant.*

Even assuming that the present petitioners (subsequent applicants) were in some way parties to the proceeding on the application of the former applicant, that gave them no right to obtain benefit under the former application and cannot obtain relief under the provisions in their favour. It was necessary for them to make an application within the prescribed time.

A co-sharer can make the application on his own behalf and recover the whole property, if he undertakes the obligation of paying the amount of the debt. There is no analogy with the case of a *pro forma* defendant being transferred to the category of a plaintiff in a civil suit.

Application by the subsequent Petitioners under section 37/A of the Bengal Agricultural Debtors Act.

The material facts will appear from the judgment.

*Mr. S. C. Jana* for the Petitioners.

*Messrs. A. C. Gupta, A. L. Mukherjee* and *Nirmal Chandra Mukherjee* for the Opposite parties.

The judgment of the Court was as follows :

*June, 8.*

**Roxburgh, J.** :—This Rule raises an interesting point under section 37 A of the Bengal Agricultural Debtors Act. The proceeding originally started by a petition dated September 4, 1942

*Civil Revision Case No. 1702 of 1950.

CIVIL.

1951.

Lankeswar Haldar
v.
Ram Gopal Naskar.

*Roxburgh, J.*

under section 37 filed by Biju Haldar, opposite party No. 4. The section had just come into force on June 18, 1942. The application was not made in Form XIX as required by Rule 77/A framed under the Act although possibly, in substance, it contains all the necessary materials, if read with the previous application under section 8 of the Act which had been made by Biju Haldar and which is referred to in his later application under section 37/A. Nothing much appears to have been done on the application but on January 10, 1944, Biju Haldar filed another application in proper form. The present petitioners Lankeswar Haldar, and Sm. Promila Sundari Dass, are co-sharers of Biju Haldar in the properties, the sale of which was sought to be set aside by these proceedings. Eventually on May 24, 1945, they themselves filed an application under section 37/A mentioning that Biju Haldar was considering withdrawing his application. Eventually on August 10, Biju Haldar withdrew his application.

It is not necessary to trace the subsequent history of the case which has once before been before this Court. The present stage is that the only question for consideration is whether the application of the present petitioners under section 37/A is barred by limitation. Even since the point was taken it has been decided against them. The decision of the learned First Extra Additional District Judge of 24-Parganas which is the subject matter of the present Rule is based on the view that the original application of Biju Haldar on September 4, 1942, was no application under the Act and therefore, no application of any sort had been made by any party under section 37/A before January 10, 1944, which was therefore out of time the period of limitation being uptill one year from June 18, 1942 the date of commencement of the Bengal Agricultural Debtors Act, 1942.

Mr. Jana appearing on behalf of the petitioners has contested this view. Mr. Atul Chandra Gupta appearing on behalf of the opposite party does not attempt to challenge the argument as put forward by Mr. Jana but contends simply that the only question for consideration is as to when was the application made by the present petitioners. His contention is that even assuming that the application of Biju Haldar was good that application could only be for the benefit of Biju Haldar, and that if any co-sharer wished to make an application to obtain the benefit of the provisions of section 37/A, he was required himself to make an independent

CIVIL.

1951.

Lankeswar Haldar
v.
Ram Gopal Naskar.

*Roxburgh, J.*

application under the section within the period of limitation. Even assuming that the petitioners were in some way parties to the proceeding on the application of Biju Haldar that gave them no right to the benefit of the application of Biju Haldar and if they wished to obtain in their own favour the benefit of the provisions of this section it was necessary for them to make an application before June 18, 1943. In my opinion there appears to be no answer to this contention. It has been held that a co-sharer can make the application on his own behalf and recover the whole property sold if he undertakes the obligation of paying the amount of the debt. It seems to me to follow as a corollary that the contention of the learned Advocate for the respondents is sound. I do not think there is any analogy here between the case of a *pro forma* defendant being transferred to the category of a plaintiff in an ordinary civil suit. There is a closer analogy perhaps to the provisions of section 26F of the Bengal Tenancy Act where a special right of pre-emption is given to co-sharers under section 26F (4) (a), but they have to apply to join in the said application and a special period of limitation is laid down for such application. Thus I consider that the order of the learned Judge in the matter is correct although I am, to say the least, doubtful that the reason on which he has based his order is sound.

The Rule is accordingly discharged with costs.

S. D. G. *Rule discharged.*

# APPELLATE CIVIL.

*Before Mr. Justice G. N. Das.*

SARVAMANGALA DASSI

*v.*

PARITOSH KUMAR DAS AND OTHERS.*

CIVIL
1951.
*August, 2 & 3.*

*Bengal Money Lenders Act (X of 1940)—Section 36 (1)—Proceeding under, if a suit—Limitation for such proceeding—Article 120 Limitation Act (IX of 1908)—Right when accrues—Such suit—If one for possession—Article 144 Limitation Act—If applies—Applications under the Act—Where no period of Limitation prescribed—Proper Article—Article 181 of the Limitation Act.*

Where a final decree in a mortgage suit is passed and properties sold in execution and delivery of possession obtained and nothing remains pending for recovery of the loan, the only remedy available to the borrower is a suit under section 36 (1) of the Bengal Money Lenders' Act. Such proceedings are suits.

Section 36 (1) of the Bengal Money Lenders' Act not having provided for any period of limitation, Article 120 of the Limitation Act is attracted. Right of suit being a creature of the statute, it is incorrect to say that it accrued from the date of possession by the decree-holder which, in the present case, was prior to the coming into force of the statute.

Restoration of possession is one of the reliefs which the borrower gets when the decree is reopened and that right to relief is circumscribed by the provisions of section 36(2) (c) and (e) of the Act. It cannot be said that the suit itself is one for possession of immovable property and as such Article 144 Limitation Act has no application.

It would be incorrect to say that there is no period of limitation for applications under the Bengal Money Lenders' Act for which no specific period has been prescribed by the Act. Such cases are governed by Article 181 of the Limitation Act.

*Asmat Ali Sharip* v. *Mejahar Ali Sardar* (1) discussed.

*Abinash Chandra Dutt* v. *Gour Chandra Pal* (2) referred to.

*Appeal from Appellate Decree No. 491 of 1948 against the judgment and decree in Title Appeal No. 125 of 1947 of the Court of the District Judge, Howrah.

(1) (1947) 52 C. W. N. 64 S. B.
(2) (1951) 55 C. W. N. 489.

CIVIL.

1951.

Sarvamangala Dassi
v.
Paritosh Kumar Das.

Appeal by the Plaintiff who was the applicant in proceedings under section 36(1) of the Bengal Money Lenders' Act.

The material facts will appear from the judgment.

*Messrs. Kanti Chandra Basu* and *Nirendra Nath Kerr* for the Appellant.

*Mr. Kshetra Mohan Chatterjee* for the Respondents.

*Mr. Purendu Nath Nath* for the Deputy Registrar.

The judgment of the Court was as follows :

*August, 3.*

**G. N. Das, J.** :—This is an appeal by the plaintiff or, as the appellant chooses to say, the applicant in proceedings under section 36(1) of the Bengal Money-lenders' Act. The appellant raised money on a mortgage from the predecessor-in-interest of the respondents. The latter instituted a mortgage suit and obtained a preliminary decree for sale on the 24th of May, 1939. The decree was made final on the 12th of September, 1939. Thereafter the decree-holders started proceedings in execution and prayed for realisation of the decretal dues by a sale of the mortgaged properties. The mortgaged properties were sold on the 15th of February, 1940 and were purchased by the decree-holder. Thereupon the decree-holder auction-purchaser applied for possession and possession was delivered to them on the 20th of June, 1940. It does not appear that thereafter any further proceedings were taken by the decree-holders or by the auction-purchaser the Bengal Money-lenders Act having come into force on 1st September, 1940 the appellant, judgment-debtor in the execution proceedings made an application for relief under section 36 the Bengal Money-lenders Act on the 10th of August, 1946. The applicant prayed for the reopening of the mortgage decree and for payment of the sum in instalments and for restoration of possession of the mortgaged properties which were acquired by the decree-holders in consequence of the execution of the mortgage decree.

The respondents raised certain defences, the principal defence being that the application for relief under the Bengal Money-lenders' Act was not available to the present appellant and that his right to relief was barred by the one years' rule of limitation contained in section 36 (6) (a) (ii) of the Bengal Money lenders' Act.

CIVIL.

1951.

Sarvamangala Dassi v. Paritosh Kumar Das.

G. N. Das, J.

The trial Court repelled the defence and reopened the mortgage decree and passed a new decree for a sum of Rs. 764-6 annas which was made payable in six instalments commencing with Asar 1354 B.S.

The respondents preferred an appeal. The appeal was heard by the learned District Judge, Howrah. The learned Judge was of the opinion that the present proceedings were barred under Article 120 of the Indian Limitation Act. In the result the proceeding initiated by the appellant was dismissed. It is the propriety of this order which is challenged in this appeal.

Mr. Basu appearing on behalf of the appellant has first contended that the present proceeding partake of the nature of an application and in this view Article 181 of the first schedule of the Indian Limitation Act might have been attracted but for the reason, as he suggests, that the present application is not an application under the Code of Civil Procedure, in his submission this fact excludes the operation of Article 181 of the first schedule of the Indian Limitation Act and it must therefore be held that there is no limitation provided for by the statute.

The basis of this contention rests on the fact that the present proceeding partake of the character of an application. Mr. Basu drew my attention to the fact that the present proceeding was registered as a miscellaneous case. This is because of the rules which have been framed under the Bengal Money-lenders' Act and has nothing to do with the character of the proceedings which were initiated by the appellant borrower. Section 36 of the Bengal Money-lenders' Act is a special provision which entitles the Court under certain circumstances to give relief to the borrower. The procedure for obtaining such relief varies according to the stage of the proceedings for recovery of a loan.

The scope of section 36 was considered by Bench decision of this Court in the case of *Satyanarayan Banerjee* v. *Radha Nath Das* (1). Mitter, J. delivering the judgment of the Court classified the various proceedings under the Bengal Money-lenders' Act under different heads. It was pointed out that if the suit for recovery of the loan was pending, the borrower might apply for relief

(1) (1941) 45 C. W. N. 1085.

CIVIL.

1951.

Sarvamangala Dassi
v.
Paritosh Kumar Das.

*G. N. Das, J.*

in that suit. No independent proceeding was necessary to obtain relief which the Bengal Money-lenders' Act gave to the borrower. If the suit for recovery of a loan was disposed of by the trial Court and the matter was pending in appeal, the borrower might claim relief under the Act by an application in the appeal under the provision of section 36 (6) (b) of the Act. If the suit or appeal had been disposed of and an execution proceeding was pending the borrower might apply for relief in the execution proceeding under the provisions of section 36 (6) (a) (i) of the Act. If no such proceedings were pending and a decree had been obtained for recovery of the loan the borrower might apply for review for the purposes of getting relief under section 36 (6) (a) (ii) of the Act within one year of the date of the commencement of the Act. The borrower has an additional remedy by way of a suit under section 36 (1) of the Act. It was held in that case that such a relief could be obtained either before the loan had been sued upon or after the loan had been sued upon and a decree obtained but no proceedings either by way of an appeal or by way of an execution was pending in any Court. The position therefore is that the remedy of a party varies according to the stage of the proceedings for recovery of the loan. In the present case the mortgage had been sued upon, a final decree had been obtained, the decree had been executed and the property had been sold and possession taken of the mortgaged properties. No proceeding was pending in any Court for recovery of the loan. The only remedy therefore which was available to the borrower was the remedy conferred on him by section 36 (1) of the Bengal Money-lenders' Act. The material portion of section 36 (1) of the Bengal Money-lenders' Act runs as follows :—

"Notwithstanding any thing contained in any law for the time being in force, if in any suit to which this Act applies or in any suit brought by a borrower for relief under the section whether heard *ex parte* or otherwise, the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower it shall exercise all or any of the following powers as it may consider appropriate, namely,....."

Then follow clauses (a) to (e) which define the powers which the Court will exercise under section 36 (1). Then there is a proviso which contains a limitation on the exercise of such powers. Section 36 (2) then says that if the Court in exercise of the powers

conferred by section 36 (1) re-opens the decree the Court will exercise certain other powers. One of the powers conferred on the Court is contained in section 36 (2) (c) which directs restoration of possession of the properties of the judgment-debtor which may have been acquired by the decree-holder in consequence of the execution of the decree sought to be re-opened and which are in the possession of the decree-holder at the date of the re-opened decree. Clause (c) then says that under certain conditions the property which has been restored to the possession of the judgment-debtor may revert to the decree-holder auction-purchaser in course of non-payment of the instalments provided for in the re-opened decree. If we apply the above principles it is abundantly clear that in the present case the borrower could claim the relief prayed for only by way of a suit under section 36 (1). Section 36 (1) does not prescribe any period of limitation. We have therefore to turn to the material provision of the Indian Limitation Act which is Article 120 of the first schedule of the Limitation Act. Article 120 reads as follows :—

| DESCRIPTION OF SUIT. | PERIOD OF LIMITATION. | TIME FROM WHICH PERIOD BEGINS TO RUN. |
|---|---|---|
| Suit for which no period of limitation is prescribed elsewhere in this schedule. | Six years. | When the right to sue accrues. |

The period prescribed by Article 120 is therefore, six years from the date when the right to sue accrues. The right to sue for relief under section 36 (1) of the Bengal Money-lenders' Act could not accrue to the borrower before the Act came into force. This is a right which is conferred by the Act and a party cannot claim that right prior to the date which is at a time when the right was non-existent. The Bengal Money-lenders' Act came into force on the 1st September, 1940. The present proceedings were started within six years thereof and as such would be in time. The learned District Judge was of the opinion that time ran from the date when possession was taken by the decree-holder auction-purchaser, that is the 10th July, 1940. This is obviously incorrect because the right was not in existence at the time. In my opinion therefore the view taken by the learned District Judge is erroneous and

CIVIL.
1951.
Sarvamangala Dassi v. Paritosh Kumar Das.
G. N. Das, J.

it must be held that the present proceeding started by the borrower even if it is regarded as a suit was well within time.

In this view it is not necessary to consider the submission which was made on behalf of the appellant by Mr. Basu that there was no period of limitation in the present case. But as the matter has been argued at length I may record my opinion on this question also. The basis of the contention is that the present proceeding has to be regarded as an application made to the Court under the Bengal Money-lenders' Act. The residuary Article applicable to an application is contained in Article 181 of the first schedule of the Limitation Act. That Article reads as follows :—

| DESCRIPTION OF APPLICATION. | PERIOD OF LIMITATION. | TIME FROM WHICH PERIOD BEGINS TO RUN. |
|---|---|---|
| Application for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure. | Three years. | When the right to apply accrues. |

On the face of it the Article would apply to any application and would not be restricted to an application under the Code of Civil Procedure. It was however contended that there is a large body of decision which have taken the view that Article 181 is confined to applications under the Code of Civil Procedure. An early decision of this Court is in the matter of a petition of *Iskan Chunder Ray* (1). This case has been followed ever since. But it must be remembered that at the time when these decisions were pronounced the different Articles in the first schedule of the Limitation Act all related to applications under the Code of Civil Procedure. It was therefore held that the word "application" in Article 181 must be read as *ejusdem generis* with the applications dealt with in the other Articles of the first schedule. The position however has changed since the enactment of the Indian Arbitration Act, 1940. The Indian Arbitration Act has incorporated Article 158 and Article 178 in the first schedule. These Articles deal with applications under the Indian Arbitration Act. The

(1) (1881) I. L. R. 6 Calc. 707.

basis of the decision in the case of *Ishan Chunder Ray* (1) and other cases following it has therefore been taken away. This point was considered by a Special Bench of this Court in the case of *Asmat Ali Sharip* v. *Mujahar Ali Sardar* (2) where Mukherjea, J. delivering the judgment of the Special Bench discussed this point but did not give a final opinion on the question. The applicability of Article 181 has been discussed recently in a Bench decision of this Court in the case of *Abinash Chandra Dutta* v. *Gour Chandra* alias *Pada Pal* (3) where Chunder, J. delivering the judgment of the Court has held that Article 181 applies to an application for possession under section 26 (G) (5) of the Bengal Tenancy Act. If it was necessary for me to decide this question, I would hold that an application under the Bengal Money-lenders' Act would be governed as regards Limitation in cases not expressly provided for in the Bengal Money lenders' Act by Article 181 of the first schedule of the Indian limitation Act. It would be incorrect to say that there is no period of limitation for applications under the Bengal Money-lenders' Act for which no specific period of limitation has been prescribed by the Act.

Mr. Basu also contended that conceding that the proceeding in the present cases can be regarded as a suit the proper Article to apply would be Article 144 of the first schedule of the Indian Limitation Act. That Article reads as follows :—

| DESCRIPTION OF SUIT. | PERIOD OF LIMITATION. | TIME FROM WHICH PERIOD BEGINS TO RUN. |
|---|---|---|
| For possession of immoveable property or any interest therein not here by otherwise provided for. | Twelve years, | When the possession of the defendant becomes adverse to the plaintiff. |

This Article is a residuary Article dealing with suits for possession. The question is whether a suit for relief under section 36(1) of the Bengal Money-lenders' Act can be regarded as a suit for possession. I have already referred to the material provisions of

(1) (1881) I. L. R. 6 Calc. 707.
(2) (1947) 52 C. W. N. 64 S. B.
(3) (1951) 55 C. W. N. 489.

CIVIL.

1951.

Sarvamangala Dassi
v.
Paritosh Kumar Das.

*G. N. Das, J.*

section 36 (1) and section 36 (2) of the Act. It is obvious that the whole object of a suit or proceeding under section 36 is to scale down the interest decreed and to give relief to the borrower as provided for in the Act, section 36 (2) (c) no doubt provides for restoration of possession but this is consequential on the Court re-opening the decree. Such restoration of possession is again conditioned by the terms of section 36 (2) (c) and (e) of the Act. Restoration of possession is one of the reliefs which the borrower gets when the decree is re-opened and that right to relief is circumscribed by the provisions of section 36 (2) (c) and section 36 (2) (e). It cannot be said that the suit itself is one for possession of immoveable property. I do not see my way to accept the contention raised by Mr. Basu that Article 144 would apply to such cases.

As I have already said the proper Article to apply is Article 120 of the first schedule of the Indian Limitation Act. If that Article is applied, I have already held that the present suit is within time.

No other point was raised by either party.

The result therefore is that this appeal is allowed. The judgment and decree of the learned District Judge are set aside and those of the trial Court restored with costs in this Court and in the lower appellate Court.

S. D. G.

*Appeal allowed.*

# CIVIL REVISION.

*Before Mr. Justice G. N. Das and Mr. Justice S. C. Lahiri.*

BATA SHOE CO., LTD.

*v.*

NARAYAN DAS MULLICK AND OTHERS.*

CIVIL.
1951.
*April, 19.*

*West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950), section 9 (a)—Fixation of basic rent—Meaning of premises—Different portions of present 'premises' let out to different tenants in December, 1941—If 'premises' not let out on 1st December, 1941.*

A room was let out in two portions to two different tenants on 1st December, 1941. The room was subsequently let out in whole to the present tenant removing the intervening wall. In fixing the basic rent the Rent Controller took up the rent of December, 1941 by totalling the rent of the two portions:

*Held*, that a conspectus of the various provisions of the Act is consistent only with the view that what the Act was contemplating was a determination of the relationship between the landlord and the tenant of a tenancy and to regulate the same in terms of the Act. It would be incorrect to use the word 'premises' as referable to the land itself apart from the question of a tenancy in respect of the same. The basic rent cannot be determined on the footing of the rent which was payable for the two different portions of the said premises which were in the occupation of different tenants on that date. The word 'premises' means whatever formed the subject-matter of one demise.

Application under section 38 (4) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 and sections 151 & 152 Civil Procedure Code and Article 227 of the Constitution of India by the Petitioner before the Rent Controller for fixation of standard rent in respect of a room in premises No. 24/A Canning Street of which he was a tenant.

The material facts will appear from the judgment.

*Mr. Noni Coomar Chakravarti* for the Petitioner.

*Messrs. Apurbadhan Mukherjee* and *Gopinath Nandi* for the Opposite Parties.

*Civil Revision Case No. 1920 of 1950 against an order passed in Rent Appeal No. 696 of 1949, dated 25th September, 1950 of the Court of Small Causes, Calcutta.

CIVIL.

1951.

Bata Shoe Co., Ltd. v. Narayan Das Mullick.

*April, 19.*

The judgment of the Court was as follows:

G. N. Das, J.:—This Rule was obtained by the Petitioner who is a tenant of a room in premises No. 24/A Canning Street in the city of Calcutta. The petitioner applied on the 29th of April, 1949, for fixation of standard rent in respect of the said room. The Rent Controller fixed the standard rent at Rs. 171/7/3 pies with effect from the 1st of April, 1949. On appeal the Judge of the Court of Small Causes by his order dated the 25th of September, 1950, has modified the order of the Rent Controller and has fixed the standard rent at Rs. 140/9/6 pies with effect from the 1st of May, 1950. The petitioner assails the order of the Small Cause Court Judge on the ground that there was no basic rent in respect of the disputed premises and as such the fixation of standard rent was erroneous in law.

The question depends on certain facts to which reference should be made. It appears that the disputed room was let out on the 1st of December, 1941, in two portions to two separate tenants. The rent paid by the tenant in respect of the western portion of the room was Rs. 65 per mensem. The rent paid by the tenant occupying the eastern portion of the room was Rs. 58 per mensem. It appears that since September, 1942 the entire room was let out to the petitioner's predecessor-in-interest at a rent of Rs. 90, the intervening partition wall having been removed from the said room. The rent payable by the predecessor-in-interest of the present petitioner was later raised to Rs. 100. It does not appear when the rent was so increased. The Rent Controller proceeded on the footing that the basic rent could be ascertained by totalling up the rent payable in respect of the two portions of the disputed room and by giving to the landlord an increase in the taxes payable by the tenant. The appellate Court has modified this decree but the effect of the decisions of both the Courts below is the same. The decision proceeds on the footing that the room, the standarisation of rent whereof is in question, was let out on the 1st of December, 1941, at the rents paid by the tenants occupying the two portions of the said room. The question is whether it could be said that the premises, the rent whereof is sought to be standarised, was let out at a certain rent on the 1st of December, 1941.

In order to deal with this contention it is necessary to refer

to certain provisions of the West Bengal Premises Rent Control Act (Act XVII of 1950). This Act came into force on the 30th of March, 1950. The application for standardisation of rent was made when the earlier Act, West Bengal Premises Rent Control (Temporary Provisions) Act (Act XXXVIII of 1940) was in force. It is not disputed that the rights of the landlord and tenant so far as it concerns the application for standardisation of rent, would be governed by the provisions of the 1950 Act. Section 9 of the 1950 Act confers on the Rent Controller jurisdiction to fix the standard rent payable for any premises. Section 9(1) provides as follows :—"In any of the following cases the Controller shall on application by any landlord or tenant fix the standard rent as set forth hereunder :—(1) Where the provisions of schedule A apply and there is no cause for the alteration of the rate of standard rent as determined according to the schedule for any of the reasons mentioned in the following clauses, in accordance with the provisions of schedule A." We are not concerned with clauses (a) to (d) for the purposes of the present case. Clause (e) runs as follows :—"Excepting the case covered by clause (f) following where the provisions of schedule A for determining the standard rent do not apply, either because the premises or the whole of the premises were not let on the 1st day of December, 1941, or for some other reasons, or where any premises have been let rent-free or at a nominal rent, or for some consideration other than money rent, or in addition to money rent, by fixing the standard rent at a rate in accordance with schedule A, taking the rent which would have been reasonably payable for the premises if let on the 1st day of December, 1941, as basic rent under the said schedule." We are not concerned with clauses (f) and (g). We have now to refer to schedule A which is headed as "provision for determining the standard rent of premises". The disputed room is used as a shop and not for residential purposes. The material clause, would therefore be paragraph 3 which says that "where the premises are used or mainly used otherwise than for residential purposes the standard rent shall be (a) the basic rent, if a period of three years has not elapsed after the time when rent was fixed as mentioned in paragraph 1(a), or the increased rent as mentioned in paragraph 1(b) was first paid." Paragraph 3, clause (b) states further that "when the said period of three years relevant to the case has elapsed or elapses or where such period is not relevant the basic rent increased by 10 per cent, if the basic rent per mensem is not more than Rs. 100 and the basic rent increased by 15 per cent. if the basic rent is more than Rs. 100.

CIVIL.

1951.

Bata Shoe Co., Ltd.
v.
Narayan Das Mullick.

G. N. Das, J.

The question what is the basic rent is dealt with in paragraph 1 of schedule A. We are not concerned with clause (a) of paragraph 1 in the present case. Clause (b) of paragraph 1 states that "where the rent of the premises has not been so fixed the rent which was payable for the premises on the 1st day of December, 1941, or if any increased rent was paid for the premises between that date and the coming into operation of this Act, the increased rent, which was last paid but not as to exceed the rent payable on the 1st of December, 1941, by more than 10 per cent. in case of premises within Calcutta and 20 per centum in case of other premises". The contention raised on behalf of the petitioner is that the premises the rent whereof is sought to be standardised was not let on the 1st of December, 1941. The ground suggested is that the word "premises" should mean the entire subject-matter of the present demise, that is, the room taken as a whole. Mr. Mukherjee appearing for the opposite party on the other hand contends that the question which is relevant for this purpose is not whether the subject matter of the present demise was in the occupation of a single tenant or formed the subject matter of a separate tenancy but whether the subject matter of the present demise was in the occupation of tenants, and the fact that the subject matter of the demise was separately let out to separate tenants and formed the subject matter of separate letting is entirely irrelevant. In order to determine this question we have to consider the meaning of the word "premises" as used in section 2, clause 8. The word "premises" is defined to mean "any building or part of a building or any hut or part of a hut let separately and....." In its grammatical sense the word "premises" obviously means a building or part of a building or a hut or part of a hut which is the subject matter of a separate demise. In other words, the word "premises" means whatever formed the subject matter of one demise. Neither the context nor the subject, requires us to place a forced construction on the word "premises" as suggested on behalf of the opposite party. That the meaning of the word "premises" as contended for by the petitioner is the correct one, receives support from the definition of the words "landlord" and "tenant" as occurring in the Act. The word 'landlord' is defined in section 2, clause 4 of the Act to mean any person who for the time being is recovering the rent of any premises from the tenant thereof and includes any person who is entitled to bring a suit for such rent. The word "tenant" is defined in section 2(11) to mean any person to whom rent is, or but for a special contract would be,

payable for any premises and includes any person who is liable to be sued by the landlord for rent. When the Act therefore speaks of an application either by the landlord or the tenant to apply for fixation of standard rent it obviously implies that the Controller is required to fix the rent of the tenancy in question. That is the true interpretation of the word "premises" would also appear if we consider the other provisions of the Act, namely, provisions for ejectment of a tenant etc. the word "premises" or the whole of the premises in section 2 clause (c) do not point to a different conclusion. In my opinion, a conspectus of the various provisions of the Act is consistent only with the view that what the Act was contemplating was a determination of the relationship between the landlord and the tenant of a tenancy and to regulate the same in terms of the Act. It would be incorrect to use the word "premises" as referable to the land itself apart from the question of a tenancy in respect of the same. On all these grounds we are of the opinion that the contention raised on behalf of the petitioner is correct. It must therefore be held that the basic rent of the premises cannot be determined on the footing of the rent which was payable for the two different portions of the said premises which were in the occupation of different tenants on that date. The Court has got a determine what rent was properly payable for the premises the rent whereof is now sought to be standardised, on the material date, namely, the 1st of December, 1941. As the case was not properly approached by the Courts below from the correct angle it is necessary that the orders of the Rent Controller and of the Small Cause Court Judge should be vacated and this application remitted to the Rent Controller for fixing the standard rent in the light of the observations contained in this judgment. The petitioner is entitled to the costs of this Rule, hearing-fee being assessed at two gold mohurs.

S. C. Lahiri, J. :—I agree.

B. D. G. *Rule made absolute.*

# ORIGINAL CIVIL.

*Before Mr. Justice P. B. Mukharji.*

CIVIL. 1951. April, 2.

## GOPI MOHON BHATTACHARJEE

*v.*

## SAMBHU CHARAN NUNDY AND ANOTHER.*

*Undertaking—Primarily a matter between the Court and the litigant—Substantially a major consideration which induces the other party to agree to certain terms.*

*Interlocutory consent orders—May be discharged or varied on motion—But an undertaking in a final consent decree cannot be so discharged or varied.*

*Court's power to punish contempt by committal—Always discretionary—Contempt application, purpose of.*

It is quite true that an undertaking is primarily a matter between the Court and the litigant. But it is also incidentally and very often substantially one of the major considerations by which the other contending party agrees to certain terms of settlements.

When a consent decree is passed containing respective undertakings to Court given by the plaintiff and the defendant and each is the consideration for either of the parties agreeing to the terms of settlement, then variation by Court of any particular undertaking given by one party without the consent of the other is unjustified. Such variation may destroy the very basis of the consent decree.

Interlocutory consent orders containing an undertaking, could be discharged or varied on motion to the Court. But an application merely to vary or discharge an undertaking embodied in a final consent decree signed, completed and filed is incompetent and cannot be entertained by Court.

*Mullins* v *Howell (1)* and *Ainsworth* v *Wilding (2)* referred to.

The Court cannot be compelled to punish by committal a contempt committed by breach of an undertaking Court's power to punish contempt by commital is always discretionary and also carries with it the power to pardon contempt if need be.

* Application in re : Suit No. 2474 of 1949.

(1) 11 Ch. D. 763.
(2) [1896] 1 Ch. D. 673.

The purpose of contempt application is to see the honour of the Court respected and its orders obeyed. The object of the Court wielding its power to punish contempt is always for the cause of administration of justice. That is its only interest in contempt jurisdiction and to that end the power is dedicated. In this respect neither pique nor vindictiveness at all enters into its consideration.

Application by the Defendant for committing the Plaintiffs Shambhu Charan Nundy and Nilmoni Nundy for contempt and for varying and discharging the undertakings given by the Defendant applicant under the consent decree.

The material facts will appear from the judgment.

*Mr. R. C. Deb* for the Applicant.

*Mr. A. C. Mitra* for the Respondent.

The judgment of the Court was as follows :—

*April, 2.*

P. B. Mukharji, J. :—This is the defendant's application for committing the plaintiffs Sambhu Charan Nundy and Nilmoni Nundy for contempt and for varying and discharging the undertakings given by the defendant applicant under the consent decree.

The questions have been argued before me ; one relates to the pillars according to the sanctioned plan of the Corporation, and the other relates to a window in the south-eastern room, which is the alternative accommodation given under the consent decree to the defendant.

The consent decree is dated the 23rd November, 1950. The terms of the consent decree are set out in annexure B to the petition. There are respective undertakings of the plaintiffs and the defendant in the various clauses of the terms of settlement ; for instance, clause 2 of the terms of settlement contains undertakings given both by the plaintiff as well as by the defendant. Similarly, clause 5 (wrongly numbered as 5 in the terms of settlement) embodies the undertaking by the defendant.

With regard to the first question about pillars, it is admitted that the plaintiffs have not built them according to the sanctioned plan attached to the decree and have thus failed to carry out the

CIVIL.

1951.

Gopi Mohon Bhattacharjee v. Sambhu Charan Nundy.

P. B. Mukherji, J.

terms of the consent decree. The contention is therefore established.

Mr. Mitter's clients have however in the affidavit that they have filed as also in Court offered apologies through Mr. Mitter to this Court. Mr. Mitter has also on behalf of his clients given an undertaking to the Court that the pillars will be built according to the sanctioned plan attached to the decree. I accept that apology and that undertaking.

The purpose of a contempt application is to see the honour of the Court respected and its orders obeyed. The sole object of the Court wielding its power to punish for contempt is always for the cause of administration of justice. That is its only interest in contempt jurisdiction and to that end such power is dedicated. In this respect neither pique nor vindictiveness at all enters into its consideration. I think justice in this case will be vindicated by accepting the apology and the undertaking given by the plaintiffs to put up the pillars according to the sanctioned plan and by the respondent plaintiffs paying the costs of this application.

The case made out by the plaintiffs in their affidavit with regard to the pillars is that it was really more desirable to have two pillars instead of three as shown in the sanctioned plan, as three pillars would only take more space than two pillars and the pillars have been placed in such positions that two in the case are enough and that such arrangement they thought would be better for the defendant. Be that as it may, it is unfortunate that the pillars were not put up according to the exact directions of the Court and according to the sanctioned plan to which the parties agreed by the terms of settlement. I am not concerned here with the reasonableness of what they have done but having regard to these reasons I am prepared to give the plaintiffs another chance and thus accept the undertaking given to-day. Mr. Deb appearing for the defendant is prepared to accept such undertaking as he says his client wants the pillars to be constructed in the manner laid down in the sanctioned plan attached to the consent decree.

With regard to the opening of a window in the southeastern room which is the alternative accommodation given to the defendant after he vacates the room in which he is in occupation now,

it is said that there was a window at the time but has since been closed. The result is that the room has now no window at all. The room is intended to be used as a dispensary.

Now, there is no undertaking with respect to this particular contention. Even if it is assumed that there was a window in the room but has been closed since as appearing in the affidavit of Dr. Sudhir Kumar Chakravarty affirmed on the first day of February, 1951, the applicant's case for contempt is not helped or advanced. Clause 1 of the terms of settlement provides that "the plaintiffs agree to let to the defendant the south eastern room on Masjidbari Street having two shop doors on the said street of No. 124 Upper Chitpore Road. The room is demarcated in red in attached plan." If the applicant has any remedy on this basis and if the applicant is right in his contention that there was in fact a window which has been blocked, he will have to choose appropriate remedies as he may be advised if there be any such remedies open to him. I have however no doubt in my mind that breach, even if there is any, of the term the applicant cannot in any event proceed in contempt. The question whether there was a closing down of the window at the date or the time when the consent decree was made does not appear to me to be established on the affidavits. On behalf of the plaintiffs, it is said both in the affidavit as in the statement of counsel to the Court that the window was closed about eight months ago. That would show that there was in fact no window at the time of the consent decree.

There is also an affidavit of the previous tenant Paresh Nath Sil, who left this house and is no longer a tenant of the plaintiffs, saying in support of the plaintiffs, that the window was closed about 8 months ago. The engineers on other side have sworn affidavits to support their respective client's case. Mr. Jagannath Ganguly, in support of the applicant, makes the case that from the construction it appears that the window has been closed recently, but of course he does not give, or venture to give, any approximate date and he does not say what he means by the word 'recently.' Equally, on the other side, another professional gentleman by the name of Mr. K. C. Pal, an engineer, chooses to say that there "possibly could not be" any window. Be that as it may, I do not think that it helps the applicant inasmuch as

CIVIL.

1951

Gopi Mohon Bhattacharjee v. Sambhu Charan Nandy.

*P. B. Mukharji, J.*

there is no undertaking in respect of the alleged window, as indeed it could not be, having regard to the present dispute.

Mr. R. C. Deb, appearing on behalf of the applicant, asks me that on this ground I should discharge his client's undertaking under clause 2 of the terms of settlement to go into the south-easten room. I do not think that the exact language of clause 2 gives any strength to this argument of Mr. Deb. But, even assuming that the question of the defendant being released from his undertaking to go into the south eastern room can arise, I do not see how I can give effect to it.

This is a consent decree and unless the parties agree, it will not be for the Court to alter the decree Mr. Deb submitted without any authority that the Court can always vary the undertaking given by a litigant. I do not think that such a broad proposition is either correct in law or sensible. It is quite true that an undertaking is primarily a matter between the Court and the litigant but it is also incidentally, and very substantially, one of the major considerations by which the other contending party agrees to certain terms. Here, as I analyse the terms of settlement under the consent decree I find there are respective undertakings given by the plaintiffs and the defendant to the Court and each is the consideration for either of the parties coming to the terms of settlement as they did To vary, therefore, one particular undertaking of a particular party, the defendant, in this case, and at the same time keeping the other undertakings of the plaintiff to the court intact, would be, in my view, unjustified because it will irreparably prejudice the plaintiffs. It is conceivable that if the defendant had not given that undertaking to court, the plaintiff would never have agreed to the terms of settlement as embodied in the consent decree. I am, therefore, not willing to upset these undertakings and thus destroy the very basis of this consent decree.

The law, as far as I know, is also to the same effect. Jessel M. R. in *Mullins* v. *Howell* (1), referred to this question and the learned Master of the Rolls comes to this conclusion that interlocutory consent orders containing any undertaking could be discharged or varied on motion to the Court, if such undertaking was given by mistake and where to enforce it will

(1) 11 Ch. D. 763 (766).

be an oppression on the party who gave such undertaking. I am of the view that the same position cannot be said to arise in a case where the final decree has been made, signed, passed and filed embodying the undertakings. The ratio of the decision of Jessel M. R. was based on the well known principle that the Court always has a "general control" over orders made on interlocutory applications and therefore has jurisdiction to mould them. Such is not the case where the Court has lost seisin of the matter after the completion of the final decree. Romer J. in *Ainsworth* v. *Wilding* (1), reviewed almost all available authorities including the one of Jessel M. R. and was of the view which supports my conclusion.

An application merely to vary or discharge an undertaking embodied in a final consent decree signed, completed and filed is in my judgment incompetent and the Court has no jurisdiction to entertain such application. But that does not mean that in case of every breach of an undertaking in such a consent decree or for the matter in any other final decree signed, completed and filed, the Court has no option but to punish such breach by committing the contemnor to prison. Such committal is always discretionary with the Court, and the Court exercises such discretion on the facts of individual cases after their due consideration. Court's power to punish contempt always carries with it the power to pardon contempt if need be.

Mr. Deb apprehends that as there is no window the room would not be usable and if his client cannot get into that room, then he might be proceeded in contempt by the plaintiffs at a later stage. If that is so, then that will be the proper stage for him to raise this question either for relief or of condonation on proper grounds. I do not therefore think I can make any order or I should make any order in respect of the window at this stage.

The order, therefore, will be recording of the plaintiffs' undertaking to Court to put up the pillars as shown in the sanctioned plan attached to the decree and the plaintiffs will pay the cost of this application to the applicant. The key of the said south-easterly portion of the room is admittedly in the hands of the applicant. The plaintiffs undertake to Court to commence work of construction of the pillars according to the sanctioned plan within a week from the date of the key being sent by the applicant's solicitor

(1) [1896] 1 Ch. D. 673.

CIVIL.
1951.
Gopi Mohon Bhattacharjee v. Sambhu Charan Nundy.
P. B. Mukherji, J.

to the plaintiff's solicitor. Plaintiffs further undertake to this Court to finish such construction of pillars within a month from such commencement of the construction.

*Messrs. Leslie & Hinds :* Solicitors for the Applicant.

*Mr. R. K. Dey :* Solicitor for the Respondents.

S. K. R. C. *Application dismissed.*

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*Before Mr. Justice R. S. Bachawat.*

CIVIL.
1951.
*January, 11.*

BEJOY SINGH KARNWAT

*v.*

BILASROY & CO.*

*Arbitration—Setting aside an award—Misconduct, what is—Measure of damages—Damages on the basis of black market price—Evidence of extension of time—Duty of the Bengal Chamber of Commerce to take evidence—Rules of the Bengal Chamber of Commerce—Jute Price Control Order.*

If there is a serious dispute about a matter which is peculiar to the parties and is not common to the trade the Bengal Chamber of Commerce would be guilty of misconduct if they refuse to take evidence in spite of request by the parties to take evidence. Even where no request is made by the parties if on the document disclosed by the claimant it appears that he has really no case, the Chamber of Commerce would be guilty of misconduct if they proceed to make an award in favour of the claimant without calling upon him to substantiate his case by oral evidence.

If the date of breach is a date when the Jute Price Control Order was in operation the ordinary measure of damages is the difference between the contract price and maximum price fixed by the Control Order. Any claim in excess of such difference is illegal and in contravention of the Control Order and the Arbitrators are guilty of misconduct if they recognise and allow such claim whether the claim is on the basis of an illegal market price on the date of the breach, or on the basis of price on a subsequent date when the Jute Price Control Order ceased to be in operation, even if there was no market for the goods on the date of breach and the first free market was on a subsequent date.

*Award Case No. 189 of 1950. Application for setting aside an award of the Bengal Chamber of Commerce.

CIVIL.
1951.
Bejoy Singh Karnwat
v.
Bilasroy & Co.

In a contract of reference to the Arbitration of the Bengal Chamber of Commerce the Rule of the Chambers are imported into the contract and the parties are bound by the Rules under which the Chamber can decide without taking oral evidence.

Inspite of the Rules of the Bengal Chamber of Commerce in a proper case it is the duty of the Chamber of Commerce to take evidence. The power not to take evidence involves a duty to take evidence when the circumstances demand it.

Arbitration Tribunal of the Bengal Chamber of Commerce being experts in the trade may decide on a question which is common to trade without taking evidence, such as the market price, or usages of trade.

The Bengal Chamber of Commerce can decide a custom of automatic extension of the due date without taking evidence.

Even if there is a dispute between the parties on a matter of fact peculiar to the parties e. g. a dispute whether or not there was oral extension of the due date the Arbitrators are ordinarily justified in deciding such dispute upon written statements and without calling oral evidence in the absence of any request from the parties to take oral evidence.

Application by the Petitioner, Bejoy Singh Karnwat for setting aside an award of the Bengal Chamber of Commerce.

The material facts will appear from the judgment.

*Messrs. E. R. Meyer* and *A. C. Bhabra* for the Petitioner.

*Mr. B. Das* for the Respondents.

The judgment of the Court was as follows :

*January, 11.*

**R. S. Bachawat, J.** :—This is an application for setting aside an Award of the Bengal Chamber of Commerce.

By a contract dated May 10, 1946, the petitioner Bejoy Singh Karnwat agreed to sell to the respondent Bilasroy & Co., 45,000 bags B Twills delivery July to September 1946 at Rs. 66-12 per 100 bags. The contract is on the standard Indian Jute Mills Association contract form which contains the following arbitration clause :—

"All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this Contract whether or not the

CIVIL.

1951.

Bejoy Singh Karnwat
v.
Bilasroy & Co.

*R. S, Bachawat, J.*

obligation of either or both parties under this Contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or or completed shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

The petitioner did not give delivery of these goods to the respondent firm. The respondent had sold these goods to one Sohonlal Karnwat at the same rate and the respondent in its turn also failed to give delivery to its buyers.

On October 1, 1946, the respondents buyers sent a letter to the respondent intimating that on that day the goods had been bought in the open market at Rs. 78-4 per 100 bags. On October 7, 1946 the respondent communicated the substance of this letter to the petitioner. On October 7, 1946 the respondent's buyer sent to the respondent a bill for Rs. 5,175 on the basis of the difference between the contract price and price of repurchase on October 1, 1946 and asked for payment of that bill. The respondents in their turn on October 18, 1946 sent to the petitioner a bill for the identical sum on the same basis and requested the petitioner to pay the bill. No. reply was sent by the petitioner to any of these letters, nor was any payment made of the difference bill.

On July 7, 1949 the respondent referred the dispute to the arbitration of the Bengal Chamber of Commerce. In the letter of reference the respondent referred to the contract between the parties as also to the contract between the respondent and Sohanlal Karnwat and to the correspondence passed between the parties and asked for an award of Rs. 5175. The petitioner filed his statement on January 13, 1950 stating that his seller had failed to deliver the goods, that the respondent never issued any shipping instructions that the time for delivery was never extended and in any event damages in excess of the maximum controlled rate could not be claimed and that the petitioner had no concern with the respondents' buyers. On January 20, 1950 the respondents filed its second statement stating that upon demands for delivery being made the petitioner had been assuring that the goods had not been received from his sellers and that he will deliver the goods on receipt and that in view of such assurance the

contract continued to exist and was extended till such time when goods could be available in the free market or it was possible to assess the damages and that it was the option of the respondents not to send the shipping instructions and that if damages could not be given on the basis of repurchase, damages should be awarded on the basis of the market price on October 1, 1946. The petitioner later on filed a second statement reiterating his previous stand.

On March 20, 1950 the Bengal Chamber of Commerce made an award which is as follows :—

1. That there was no free market available for these goods on the contract due dates of July, August, September 1946 and the first free market available thereafter was on October 1, 1946.

2. That Messrs. Bejoy Singh Karnwat shall pay to Messrs. Bilasroy & Co., Ltd., in full settlement of their claim herein the sum of Rs. 5175 together with interest thereon at the rate of 4 per cent. per annum for six months only.

3. That Messrs. Bejoy Singh Karnwat shall pay to Messrs. Bilasroy & Co., Ltd. the cost of this arbitration which we fix at Rs. 343-8 and which are to be recovered by the Tribunal from the sum of Rs. 400 deposited by Messrs. Bilasroy & Co., Ltd. On April 22, 1950 the Registrar of the Bengal Chamber of Commerce informed the parties that there was a clerical error in the award and that the name of the buyers was Messrs. Bilasroy & Co., and not Bilasroy & Co., Ltd.

The notice of the filing of the award was served upon the parties and the present application was made on August 24, 1950.

Mr. Meyer appearing on behalf of the petitioner contended that the award ought to be set aside on the following grounds :—

(1) That the award was in contravention of the Jute Price Control Order and was illegal and against public policy.

(2) That the arbitrators could not decide the dispute as to extension without taking evidence and they were guilty of misconduct in not calling for evidence and deciding the matter without taking evidence.

CIVIL.

1951.

Bejoy Singh Karnwat
v.
Bilasroy & Co.

*R. S, Bachawat, J.*

(3) That there is an error of law on the face of the Award.

During recent times numerous applications have been made to this Court for setting aside the award of the Bengal Chamber of Commerce made with regard to contracts for the sale of jute and jute manufactured goods under which deliveries were stipulated to be given on dates which fell within the currency of the Jute Price Control Order. The Jute Price Control Order, 1944 fixed the maximum price in excess of which it was illegal either to buy or to sell jute or jute manufactured goods. This Control Order expired on September 30, 1946. All those contracts were on the standard Indian Jute Mills Association Contract Form and all of them contained the usual arbitration clause providing for reference to the Bengal Chamber of Commerce. The buyers claimed from the sellers damages for non-delivery of the goods and referred the dispute to the arbitration of the Bengal Chamber. As a rule the buyers claimed much more than the difference between the contract price and the maximum controlled price. In some cases damages were claimed for breach of contract on the due dates without any allegation of extension of the due dates and the damages claimed was quite clearly illegal and in flagrant contravention of the Jute Price Control Order. In other cases the buyers alleged extension of the due date either by agreement or by some usage prevailing in the market and claimed the difference between the contract price and the market price on a date subsequent to September 30, 1946. As a rule awards were made in favour of the buyers allowing their claims. The recent course of decisions in this Court establish that the arbitrators are guilty of misconduct if they award on the footing that the goods could be bought and sold at prices in excess of the maximum controlled price during the currency of the Jute Price Control Order or if in a proper case they decide on the question of extension without taking evidence it being their duty to take evidence inspite of rules 15 and 16 of the Arbitration Rules of the Bengal Chamber of Commerce which are as follows:—

XV. The dispute will normally be decided by the Court on the written statements of the parties and oral evidence will not be taken nor will the parties be entitled to appear, or any formal hearing be held. The Court shall have power however if it thinks fit to appoint a time and place for the hearing of the reference and to hear oral evidence.

XVI. In any case of a formal hearing no party shall, without the permission of the Court, be entitled to appear by Counsel,

attorney or other advocate or adviser, but the Court in its discretion may require the parties with or without witness to attend before it or before any Committee or Sub Committee of the Chamber to be examined.

Until recently and even as late as April, 1948 the approach of this Court to such awards was somewhat different and reference may be made to the judgment of Das, J. in *In re. Arbitration: Sree Kissen Beriwalla Ltd. and Messrs. Narsindas Ganeshlal* (1). In that case the contract was for July to September, 1946 delivery. In August and September, 1946 the buyers wrote to the sellers agreeing to extend the time for delivery but the sellers in their turn promptly replied refusing to agree to such extension and requesting the buyers to send the difference bill on the basis of the maximum controlled price. In the statement filed before the Arbitrator the buyer alleged that there were oral extensions of time upto the 30th September, 1946 which were confirmed by the above correspondence and claimed damages on the basis of a purchase on the 1st October, 1946. The sellers denied the extension and stated that they had offered to pay and were ready and willing to pay the difference on the basis of the maximum controlled price. The Bengal Chamber of Commerce made an award for the amount claimed by the buyers. Das, J. observed as follows:—

"It is stated that the petitioner having intimated to the respondent its inability to deliver goods and having admitted its liability for non-delivery and having sent to the respondent its cheque for Rs. 112-8 representing the difference between the contract rate and the market rate prevailing on the due date when the Jute Price (Control) Order was in force there was no dispute between the parties. I do not think there is any substance in this contention.

"The next ground urged is that the arbitrators failed to appreciate the facts and the correct legal position. Reference is made to the correspondence which I have summarised above and it is pointed out that in those letters no case whatever was made as to any oral application for delivery on the part of the respondent or any oral arrangement for extension of the due date. These are questions of fact which had to be decided by the Arbitrators as the tribunal chosen by the parties. Inspite of the comments made

(1) Unreported judgment of *Das, J.*, dated 15th April, 1948 in Award Case No. 39 of 1948.

Civil.
1951.
Bejoy Singh Karnwat
v.
Bilamoy & Co.
R. S. Bachawat, J.

before me the arbitrators evidently accepted the case of extension. This Court cannot sit as a Court of Appeal over the decision of the domestic tribunal. In my opinion, there is no force in this objection.

"The last objection urged is that the arbitrators did not give any opportunity to the petitioner to adduce evidence as to the quantum of damages and that they failed to assess damages according to law. The reference to arbitrators' arbitration was subject to the rules of the Tribunal of Arbitration. Under those rules the arbitrators proceed on the respective statement of the parties as evidence before them and the parties are not entitled as of the right to adduce any oral evidence although the arbitrators may, if they think fit, call for and hear oral evidence. The arbitrators evidently were satisfied with the evidence disclosed before them in the respective statements as to the alleged calculation of damages. The further answer is that it does not appear on the face of the award as to the date on the basis of which the arbitrators had assessed the damages. Further if the arbitrators accepted the story of extension of the due date up to the 30th September, 1946, it was for the arbitrators to consider whether the damages should be calculated on the basis of the rate prevailing on the next day."

The approach of this Court to such awards is somewhat..... different since the 30th April, 1948. I will first deal with the group of cases in which there was no allegation by the buyer that there was any extension of the due date either by agreement or by custom. In these cases the buyers claimed damages for non-delivery on the due dates of the contracts which fell within the currency of the Jute Price (Control) Order, on the basis of the difference between the contract price and the price which was recommended and fixed by an association known as the Calcutta Gunny Traders Association for the settlement of such contracts and the Arbitrators had allowed the claims of the buyers. This Court was then called upon to decide the applications made by the sellers for setting aside the awards. On the 30th April, 1948 one of such cases being *Raghunath & Son* v. *Mahammed Umer & Co.* (1), came before Sinha, J. The contract there was for April to June, 1946 delivery. Sinha, J. set aside the award on the

(1) Unreported judgment of *Sinha, J.*, dated 30th April, 1948 in Award Case No. 241 of 1947.

ground that the arbitrators were guilty of misconduct. This decision was followed by Clough, J. in *In re. Arbitration: Dharmchand Tamakuwalla* v. *Khusiram Benarsilal* (1) where the contract was for January to March, 1946 delivery. Clough, J. held that it was not a case of mere error of law and observed as follows:—

"By reason of public policy provision has been made prohibiting trade in this particular comodity at all material times at a rate higher than that notified. In allowing damages calculated on the basis of a higher rate the arbitrators have in effect awarded damages upon the footing that at the material time the trader could have sold his goods at a rate higher than that allowed by the control measure. I agree with the decision of Mr. Justice Sinha that this amounts to misconduct."

An appeal was preferred from the judgment of Clough, J. and the appeal was heard by the Chief Justice and Sinha, J. in *Khusiram Banarsilal* v. *Girdharilal Dharamchand* (2). The Appeal Court upheld the judgment of Clough, J. and observed as follows:—

"It is contended on behalf of the appellant that the learned Judge's decision is wrong. It is urged that at the most the arbitrators were guilty of an error and as the error is not apparent on the face of the award, it was not open to the learned Judge to set aside the award. That may be so. It is open however to the Court to look into the papers filed before the Arbitrators and to set aside the award if the Court comes to the conclusion that the arbitrators were guilty of misconduct.

"The word 'misconduct' includes any mishandling of the arbitration proceedings or any neglect of duties and responsibilities on the part of the arbitrators which is likely to lead to substantial miscarriage of justice.

"It is clear from the material before us that the arbitrators have been guilty of legal misconduct.

"Under a contract for sale the ordinary measure of damages upon a breach is the difference between the contract price and the market price on the date of breach. It is quite clear from

(1) Unreported judgment of *Clough, J.*, dated 3rd May, 1948 in Award Case No. 26 of 1948.

(2) Unreported judgment of *C. J. & Sinha, J.* in Appeal from Original Order No. 80 of 1948.

CIVIL.
1951.
Bejoy Singh Karawat
v.
Bilasroy & Co
R. S, Bachawat, J.

the bill submitted by the appellant as also from the letter of the appellant referring the disputes to the Bengal Chamber that the appellant was claiming damages for non-delivery on that basis. No claim was made on the basis of loss of profits and no other mode of assessment of damages was suggested at any time before or after the arbitration proceedings had started. The claim was made on the footing that on the date of breach, the goods could not be bought in the market at the controlled rate and therefore the respondent ought to be made to pay the difference on the basis of a market rate which the Gunny Trades Association had fixed in respect of transactions where sellers had committed breach by non-delivery in July, August and September, 1946.

"The rate fixed by the Jute Price Control Order for sale and purchase of jute up to September, 1946 was Rs. 28 per 100 yards. Any sale or purchase at a higher rate was a criminal act punishble under the Defence of India Rules. The market rate could not exceed the maximum rates fixed under the said order. If there was any market where it was possible to sell and purchase Jute at rates in excess of the said maximum rates it was a 'black' market which could not be recognised by the arbitrators. Recognition of such a market involves encouragement of something which was criminal and against public policy.

"The arbitrators in awarding damages as claimed by the appellant have recognised that at the material time the appellant could buy similar goods in the market at Rs. 31-8 and they have in effect awarded damages on that footing.

"The arbitrators must be presumed to know the law and that maximum rates for sale and purchase of jute had been fixed under the said order.

"The award of the arbitrators amounts to a disregard of the law. They have recognised an illegal market for sale and purchase of jute and have awarded damages on the basis of a market rate which it was a criminal offence to sell and purchase jute. It is impossible for the Court to give finality to an award made on such basis."

The appeal from the judgment of Sinha, J. in *Mahammad Umar's* case (1) was later on upheld by the Court of

(1) Unreported judgment of *Sinha, J.*, dated 30th April, 1948 in Award Case No. 241 of 1947.

Appeal consisting of the Chief Justice and Chatterjee, J. in *Raghunath & Son* v. *A. R. Md. Umer & Co.* (1). These cases were followed in the case of *Chhogmal Rawatmal* v. *Sankal Chand G. Shah* (2), where the contract was for April to June, 1946 delivery. In the latter case although there was no allegation of extension, the award was sought to be supported on the ground that the arbitrators might have proceeded on the ground of extension. Chatterjee, J. repelled that contention and he held that the arbitrators could not decide on a question of extension without any allegation as to extension and without taking any evidence in respect thereof.

The principle of these decisions was somewhat extended by the Appeal Court in *Haji Sattar Haji Pir Mahammad* v. *Khusiram Banarsilal* (3). In this case the contract was for July to September, 1946 delivery and the buyer claimed damages on the basis of the price fixed by the Gunny Traders Association without any allegation as to extension. The seller instituted a suit claiming a declaration that the rates fixed by the Association was illegal for an adjudication of the rights of the parties and for an injunction restraining the Bengal Chamber of Commerce from proceeding with the arbitration. An application for stay of the suit by the buyer was dismissed by Chatterjee, J., and his decision was upheld on the ground *inter alia* that the Court will not allow the Arbitration before lay arbitrators to proceed. Here the buyers were making an attempt to obtain from them damages which could not be legally given and there was really no legal dispute between the parties.

I will next deal with the series of cases in which the buyers claimed damages not on the basis of the price fixed by the Gunny Trades Association but on other grounds and questions arose as to whether the Bengal Chamber should have taken oral evidence. In *Khusiram Benarshilal* v. *Mathuradas Goverdhandass* (4), which

(1) Unreported judgment of *C. J. & Chatterjee, J.*, dated 24th March, 1949 in Appeal from Original Order No. 127 of 1948.

(2) (1949) 53 C. W. N. 828.

(3) Unreported judgment of *Harries, C. J. & Das Gupta, J.* in A. O. Order No. 123 of 1948, dated 25th August, 1949.

(4) (1948) 52 C. W. N. 826.

Civil.

1951.

Bejoy Singh Karawat v. Bilasroy & Co.

*R. S. Bachawat, J.*

was decided by Sinha, J. on the 30th April, 1948 the contract was for April to June delivery. On September 21, 1946 the buyer wrote extending time upto September, 30. The seller promptly repudiated the extension and asked for a difference bill on the basis of the maximum control price. On September 28, the buyer asked for immediate delivery to which the seller replied on October 1, stating that they had nothing to add. On the 21st February, 1947 the buyer claimed Rs. 1750 apparently on the basis of the price prevailing on October 1, 1946 but later on they claimed the sum of Rs. 14,250 on the basis of the price prevailing on the 31st October, 1946. In the letter of reference before the Tribunal the buyer alleged that there was an extension upto the 31st October, 1946 by the letter, dated the 28th September, 1946 and by a circular of the Gunny Trades Association. The document which was, however, alleged to be a circular was not a circular but a bill. The Bengal Chamber made an award for Rs. 14250. It was not established that the Bengal Chamber had been asked to take evidence before the award had been made. Sinha, J. set aside the award. He held that having regard to the nature and circumstances of this case it was impossible for the arbitrators to decide as they did if they really applied their minds to the facts of the case and it was their duty to call upon the buyer to adduce oral evidence in support of his case of extension where it was not possible to decide in favour of extension without oral evidence. It is noteworthy that in this judgment there is no reference whatever to the principle that an award in contravention of the Jute Price (Control) Order is against public policy although Sinha, J. delivered this judgment on the same day on which he decided *Mahammad Umer's* case (1). The reason was that the damages were claimed on the basis of the price prevailing on October 31, on the ground of an alleged extension. It is also to be observed that in the case before Sinha, J., documents disclosed by the buyers themselves showed that they had no case, and it may well be said that the award was perverse. The order of Sinha, J., setting aside the award was upheld on another ground on appeal in *Mathuradas Govredhandas* v. *Khusiram Bemarshilal* (2) decided on September 23, 1949. The Appeal Court however refused to decide the point on which Sinha, J. based his judgment.

(1) Unreported judgment of *Sinha, J*, dated 30th April, 1948 in Award Case No. 241 of 1947.

(2) (1949) 53 C. W. N. 873.

CIVIL.
1951.
Bejoy Singh Karnwat
v.
Bilasroy & Co.
R. S. Bachawat, J.

The next case is *Re. Arbitration : Mukhram Lachmi Narain* v. *Khusiram Benarasilal* (1) where the contract was for April to June, 1946 delivery. The buyer on November 5, or 15 claimed Rs. 11,500 on the basis of the price fixed by the Gunny Trades Association but later on before the arbitrators they claimed the difference between the contract price and the market price on November 28, 1946. The buyers contended that the sellers had given an assurance of delivery on receipt of the goods from their sellers and that shipping instruction had been sent, which had been retained for over 24 hours, and that really the buyers were acting as intermediary between their buyers and sellers. The allegation as to extension was not denied by the sellers in their first statement, but was denied in their second statement. Sinha, J. refused to set aside the award and his judgment was upheld by the Court of Appeal in *Mukhram Lachmi Narain* v. *Kuskiram Benarasilal* (2). The Chief Justice observed as follows :—

"The award is undoubtedly good on the face of it, and there is nothing to show by looking at the award that it was made upon no materials at all, as suggested by Mr. Chaudhuri. His argument however is that looking at the materials before the arbitrators it is clear that they could not have arrived at the conclusion, which they did, without calling for and hearing evidence, and as they did not call for and hear such evidence they were guilty of legal misconduct which vitiates the award * * * * * *

"As I have already said the arbitrators are entitled to decide the cases referred to the Bengal Chamber of Commerce upon the statements made to them by the parties, though they are empowered to call evidence. The statements made by the parties are therefore in the nature of evidence which they can rely upon, if they think proper. The statements made by the respondents clearly go to show that time for performance of the contract had been extended and the learned Judge has pointed out that there has been no categorical denial of that in the first statements of the appellants. If there was material upon which the arbitrators could hold that the time for performance had been extended, then

(1) Unreported judgment of *Sinha, J.*, dated 3rd September, 1948 in Award Case No. 133 of 1948.

(2) Unreported judgment of *C. J. & Chatterjee, J.* in A. O. Order No. 2 of 1949, dated 29th March, 1949.

Civil.
1951.
Bejoy Singh Kanwat v. Bilaroy & Co.
R. S. Bachawat, J.

it would be for the arbitrators to find when the contract was eventually repudiated by the sellers. It was suggested by Mr. Chaudhuri that there was no evidence at all upon which the arbitrators could hold that the contract had been extended beyond the date either November 5 or November 15, 1946, when bills for Rs. 11,500 were sent to the appellants. Sending bills based upon differences in price would normally amount to an acceptance of the seller's repudiation. But the respondents explained these bills as being an attempt to compromise the dispute. They did not claim that in sending the bills they had accepted the repudiation. In fact that their conduct went to show that they had not accepted the repudiation, because they sent shipping instructions after these bills had been sent. The case for the respondents was that time was extended until the sellers received the goods from their sellers. Whether such was the case or not was pre-eminently a point for the arbitrators to decide and if they came to the conclusion that there was an extension of time it was for them to say when the contract was eventually repudiated by the appellants.

"There was material before them upon which they could decide that time had been extended and that the breach occurred as alleged in the reference to the arbitration, namely November 28, 1946. It may well be that this Court upon the same materials would not have arrived at the same conclusion, but that is immaterial. Mr. Chaudhuri went on to argue that if we thought that the conclusion upon the materials was perverse then we could hold that there was legal misconduct in not calling further evidence. But it appears to me that we must very carefully draw the line, because where a Court disagrees with a finding of fact of an arbitrator, it could, if Mr. Chaudhuri is right, always upset such finding by holding that failing to call further evidence would amount to legal misconduct which would vitiate the award.

"Further, there was another point, namely, that the respondents were merely intermediaries. The arbitrators being experts in this trade would know what would be likely to happen in a case of this kind and would be able to judge upon materials whether or not the respondents were principals or merely intermediaries. Whether they were found to be principals or intermediaries it is impossible to say. All we know is that an award was made in favour of the respondents and that award may have been based

on the difference in the price between the market and the contract price at the date of the breach on November 28, or it may have been based upon damages suffered by the intermediaries, as they had been called upon by Soorajmull Nagarmull to pay a sum slightly less than the sum awarded to the respondents."

The next case is *In re. Arbitration : Khusiram Benarsilal* v. *Sagarmull Dhanraj* (1). In this case there was an allegation of extension and the award was made *ex parte* as the sellers never appeared before the Arbitrators. Chatterjee, J. refused to set aside the award and observed as follows :—

"It is impossible to hold in such a case that the Arbitrators were bound to insist on oral evidence and in its absence the award is illegal. There was in fact no issue raised and in the present case the matter did not really reach the stage when any oral evidence was called for * * * * * Counsel referred me to another judgment delivered by Sinha, J. in *Raghunath & Son* v. *R. Mahammad Umar & Co.* (2) * * * In the case before Sinha, J. there was no extension pleaded beyond the expiry of the Control Order. That judgment cannot be applied in this case where extension has been pleaded."

The next case is *In re Arbitration : Srikissen Beriwalla Ltd.* v. *Hari Krishna Sadani* (3). In this case the contract was delivery July to September 1946. In August and September, 1946 the buyers wrote to the sellers extending the time, but the sellers promptly replied refusing the extension and asking the buyers to send bills on the basis of the maximum control price. In his statement before the Arbitrator the buyer alleged extension of the due date up to September 30, 1946, and also alleged that although the money was tendered on September 30, 1946, the seller asked him to tender money again on October 1, 1946, but in spite of such tender no delivery had been made. It was contended before Sinha, J. (a) that the award was in contravention of

(1) Unreported judgment of *Chatterjee, J.*, dated 21st September, 1948 in Arbitration Matter No. 139 of 1948.

(2) Unreported judgment of *Sinha, J*, dated 30th April, 1948 in Award Case No 241 of 1947.

(3) Unreported judgment of *Sinha, J.*, dated 24th September, 1948 in Arbitration Case No. 82 of 1948.

CIVIL.
1951.
Bejoy Singh Kanwat
v.
Bilasroy & Co.
R. S. Bachawat, J.

the Jute Price Control Order and was illegal; (b) that the Arbitrator could not decide an issue of extension without taking evidence. Sinha, J. refused to set aside the award and observed as follows :—

"With regard to (a) if there had been no question of extension and damages had been awarded on the basis of difference between the contract rate and the market rate prevailing on the due dates fixed by the contract and if the Arbitrators had awarded damages at a rate higher than the rate fixed by the Jute Price Control Order, the award could possibly be challenged. If the Arbitrators held that the time for performance of the contract had been extended, they could give damages at a rate higher than the maximum controlled rate, if on the extended due date the Jute Price Control Order was not in operation. In this case the allegation was that the due date for performance of the contract had been extended till September 30, 1946. If the arbitrators accepted the case of the respondents about extension of time they could award damages on the basis of rates prevailing on October 1, 1946, when the respondents purchased the goods in the market.

"With regard to (b) it is complained that the arbitrators acted wrongly in awarding damages on the basis of Rs. 83-4 per 100 bags as there was no evidence before the arbitrators for any extension of time for delivery of goods.

"Under Rule 15 of the Rules of Arbitration of the Bengal Chamber of Commerce, the disputes between the parties were normally to be decided on the written statements of the parties. Written statements were filed by the parties. There was also the correspondence between the parties prior to the reference being made. It is true that the correspondence which started on October 7, 1946, shows that there were allegations of extension and that denials thereof by the parties. Prior thereto there was no correspondence. The case of the respondents was that there had been an extension of due date upto September 30. The petitioner denied this. The arbitrators accepted the case of the respondents and did not believe the case of the petitioner. The arbitrators are commercial men of experience having knowledge and experience of the course of transactions in matters like this. The parties did not offer to adduce oral evidence or request

CIVIL.

1951.

Bejoy Singh Karnwat v. Bilasroy & Co.

the arbitrators to be allowed to call oral evidence. It is not incumbent on the arbitrators in every case where there is conflict between the parties on facts, to call for oral evidence. The arbitrators have a discretion and they have exercised it. I am not in a position to say that the exercise of discretion not to take evidence in this case amounted to misconduct.

"On the materials before the arbitrators they came to a particular conclusion. I am unable to say that the conclusion which they came to was one which no reasonable man could have arrived at or that they did not appreciate or apply their minds to the points involved. The parties clearly set out the facts and their respective contentions in their written statements and they were quite content to have the decision of the arbitrators on the written statements. It is now too late for them to complain that no oral evidence was taken. There is no mistake on the face of the award. This court cannot go into the facts and act as a court of appeal against the award of the arbitrators In my opinion, it has not been established that the arbitrators were guilty of any misconduct in making the award.

*R. S. Bachawat, J*

"The application is dismissed with costs."

The next case is *Re*: *Arbitration*: *Rajputana Trading Co.* v *Haji Ibrahim Kasim Cochinwalla* (1), decided by Sinha J. on September 29, 1948, and in appeal by the Chief Justice and Chatterjee J. on March 23, 1949. In this case the contract was for April to June delivery On September 20, 1946, the seller stated that the contract stood cancelled, but in reply the buyer made demands for delivery. The buyers claimed that due date had been extended orally as also by usage of trade. The arbitrators took evidence and made an award in favour of the buyer. The Appeal Court refused to set aside the award.

It is to be observed that in none of the above cases the awards have been set aside in a case where the buyers claimed the difference between the contract price and market price prevailing on October 1, 1946, upon the allegation that the due date or the extended due date was September 30, 1946. Indeed Sinha J. in the case *Re*: *Arbitration*: *Srikissen Beriwalla* v. *Hari*

(1) Unreported judgment of *C. J. & Chatterjee, J.* dated 23-3-49 in A.O.O. 101 of 1948.

CIVIL.

1951.

Bejoy Singh Karnwat.
v.
Bilasroy & Co.

R. S. Bachawat, J.

*Krishna Sadani* (1), and Das J. in *Re. Arbitration: Srikissen Beriwalla* v. *Naraindas Benarsilal* (2), held that the arbitrators are not guilty of misconduct if such claim of the buyer is allowed and that the error of law if any did not appear on the face of the award. Besides it was not quite clear on the authorities whether in such a case there was in fact an error of law and whether or not the price on October 1, 1946, was the correct measure of damages. In *Jamal* v. *Moolla Dawood* (3), the Judicial Committee held that the loss to be ascertained and the measure of damages is the loss at the date of the breach. In *Hailsham Laws of England, Vol. X, P.* 122, *footnote* (*u*) the measure of damages in such a case is said to be as follows:—

> "The difference is more properly that between the contract price and the market price on the day after the breach where the defendant has the whole of the day fixed for delivery on which to deliver [*Shaw* v. *Holland* (4)], but the express, or implied, terms of the contract must be given effect to."

In *Shaw* v. *Holland* (4), damages were assessed on the date of the breach of contract but there are observations both in the judgment and in course of the argument that a reasonable time may be given for the purchase of the goods after the date of the breach.

In *Panna Lal Sagoremull* v. *Mukram Radhakissen* (5), the Appeal Court observed as follows:—

> "As I read the learned Judge's judgment he came to the conclusion that the period during which the defendants might have delivered the May shipment extended to 31st October and when one looks at the correspondence of this period it is not difficult to see how it was that the learned Judge arrived at that conclusion. The material date, namely, that on which the defendants finally decided that

(1) Unreported judgment of *Sinha, J.* dated 24-9-48 in Award Case No. 82 of 1948.

(2) Unreported judgment of *Das J.* dated 15-4-48 in Award Case No. 39 of 1948.

(3) (1915) L.R. 43 I.A. 6.

(4) (1946) 15 M. & W. 136.

(5) (1922) 89 C.L.J. 77.

they would not deliver the May shipment, being 31st October, it was not unreasonable in my judgment for the learned Judge to take the market rate on 1st November."

In *Panna Lal Sagoremull* v. *Mukram Radhakissen* (1), apparently there was no evidence as to the market price on October 31, the date of the breach. In *Coorla Mills* v. *Ballabdas* (2), it appears from the report at page 558 and 555 that the Court of appeal also held that the rate prevailing on the date following the date of the breach of the contract could be properly taken into account in assessing damages, but the view of Marten J. was that it was only the loss on the date of the breach which was to be looked at and no other date should be taken into account.

In this state of authorities the case of *Re*: *Arbitration*: *Ganesh Commercial Co.* v. *Bajranglal Laduram* (3), came to be decided by Sinha J. on the 20th April 1948. In this case the dispute between the parties was with regard to September 1946 delivery. The seller on 23rd September requested the buyer to send bills on the basis of the maximum price, but the buyer sent a bill claiming the difference on the basis of the difference between the contract price and market price on 1st October 1946. In the statement before the Bengal Chamber the buyer relied upon a rule of the Gunny Trades Association to the effect that the buyer could buy against the seller on the date following the above date. The seller contended that the contract was not governed by such rule. The Bengal Chamber made an award in favour of the buyer and later on an application to set aside the award was made. Having regard to the state of the authorities and having regard in particular to the judgment of Sinha J. in *Srikissen Beriwalla* v. *Hari Krishna Sadani* (4), as counsel for the petitioner, I did not argue the question of misconduct before Sinha J. but he gave leave to the petitioner to argue the point before the Appeal Court. Sinha J. dismissed the application but his order was set aside by the Appeal Court [*Bajranglal Laduram* v. *Ganesh Commercial Co. Ltd.* (5)] and the award was set aside. The Appeal Court held that the matter

(1) (1922) 39 C.L.J. 77.
(2) [1925] A.I.R. Bom. 547.
(3) Unreported judgment of *Sinha J.* dated 20-4-48.
(4) Unreported judgment of *Sinha J.* dated 24-9-48 in Award Case No. 82 of 1948.
(5) (1949) 55 C.W.N. 147.

CIVIL.

1951.

Bejoy Singh Karnwat. v. Bilasroy & Co.

*R. S. Bachawat, J.*

was concluded by the previous Appeal Court judgments and that the award was really an award on the basis of a black market rate on September 30, 1946. In the Appeal Court the decisions, *Re. Arbitration: Srikissen Beriwalla* v. *Hari Kissen Sadani* (1) and *Re: Arbitration: Srikissen Beriwalla* v. *Naraindas Banarasi Lal* (2), were not cited but it appears to me that these decisions in so far as they hold that the arbitrators could in such a case award damages on the basis of the price prevailing on October 1, 1946, has been impliedly overruled by the Appeal Court.

The next important case is *Tolaram Nathmal* v. *Bilasrai & Co.* (3). In this case the Court was called upon, for the first time, to deal with an award which made in the same form in which it has been made in the present case. The contract was for July to September delivery. In August and September, 1946, the buyers, as usual wrote letters agreeing to extension and the sellers replied refusing to agree to extension. On the 19th October, 1946, the buyers informed the sellers that the goods had been repurchased and sent a bill of difference. In the reference before the Bengal Chamber of Commerce it was alleged that there was a custom by which the due date of delivery stood extended until after September 30, 1946, and damages were claimed on the basis of difference of price prevailing on October 1. Sinha J. refused to set aside the award and observed as follows:—

> "It is quite true that if the Arbitrator had calculated damages on the basis of difference between the contract rate and the market rate on a date on which the Jute Price Control Order was in operation they would be in effect recognising a black market and that would be an offence against the law of the land and they would be guilty of misconduct. In this case the Arbitrators have not (the rate?) available in the market during the currency of the Jute Price Control Order and the first free market came into existence on the 1st October, 1946. They therefore did not award damages on

(1) Unreported judgment of *Sinha, J.* dated 24-9-48 in Award Case No. 82 of 1948.

(2) Unreported judgment of *Das J.* dated 15-4-48 in Award Case No. 59 of 1948.

(3) Unreported judgment of *Sinha J.* dated 16-9-49 in Award Case No. 128 of 1949.

the basis of difference between this contract rate and the market rate prevailing on any date during the currency of the Jute Price Control Order. If they awarded damages on the basis of difference between the contract rate and the market rate prevailing on the 1st October, no question of Black marketing should arise because on the 1st October, there was no controlled rate. It is true that in *Bajranglal Laduram* v. *Ganesh Commercial Co. Ltd.* (1), damages were awarded as on the 1st October. But there was no finding by the Arbitrators that there was no free market during the currency of the Jute Price Control Order and goods were not procurable in the market during that period. Therefore the ordinary rule as to measure of damages between the contract rate and the market rate on the date of breach applied and as the market rate on the date of breach was controlled, no damages could be awarded in excess of the difference between the control rate and the market rate on the date of breach. In this case however it is quite clear that the arbitrators have not awarded damages on the ordinary footing because there was no free market for Jute during the currency of the Jute Price Control Order. Further in this case a custom was pleaded and it was open to the arbitrators to come to a conclusion as to whether the custom existed. I do not think the custom was inconsistent with the terms of the contract. Numerous awards have been made on the basis of such custom and and have been upheld by this Court."

This judgment was upheld by the Appeal Court in Appeal from Original Order and Decree Nos. 180 and 181 of 1949 by the Chief Justice and Banerjee J. on the 21st November, 1950. Following a previous decision of the Appeal Court in *Tolaram Nathmal* v. *Ganesh Commercial Co. Ltd.* (2), the Appeal Court held that as there was an allegation of extension by custom the award could not be said to be illegal. The Appeal Court however held that if there was no such allegation the award would have been bad and would have been set aside. The Chief Justice observed as follows:—

"However I find myself unable to agree with Sinha J.

(1) Unreported judgment of *Sinha J.* dated 20-4-48.
(2) Unreported judgment in A.O.O. 6 of 1948.

CIVIL.

1951.

Bejoy Singh Karnwat.
v.
Bilasroy & Co.

R. S. Bachawat, J.

that the award would have to be regarded as valid even if custom or usage had not been raised.

"Sinha J. appears to have thought that apart from custom as there was a finding that there was no market for these goods on the due dates, the Arbitrators would be entitled to take into account the market rate on the first day on which there was a free market.

"Normally in the case of failure to deliver goods the damages are calculated as the difference between the market price of the goods prevailing on the date of breach and the contract price. If there be no market price then the Court must ascertain as best it can the value of the goods on the date of the breach. The purpose of awarding damages is to place the plaintiff as far as the Court can in the position he would have been if the contract had been performed. If there was no market price on July 31, August 31 and September 30, then the Court or the arbitrators would have to ascertain as best they could what damage the buyers had suffered and damages would have to be awarded to compensate the buyers for such damage.

"What damage did the buyers suffer on July 31, August 31, and September 30, by reason of the failure of the Appellants to delivery? The buyers suffered damage in that they failed to obtain the goods which they had contracted to buy and the quantum of the damage would be the value of those goods. What was the value of those goods on July 31, August 31 and September 30? The price was fixed by law and any sale or purchase at a price greater than the maximum price fixed by law was illegal and a breach of the law rendering the parties liable to prosecution. It seems to me that the value of the goods on due dates would be the value as determined by the controlled rates. However the value on October 1, 1946, was far in excess of the controlled rates and the prices on October 1, would undoubtedly have been Black market prices during the period of the control. Assuming that there was no extension of the due dates, fixing the damages by reference to a market price other than the controlled price would be expressly condoning illegality which I think would amount to misconduct.

"To the honest trader his loss on due dates during the control would be the difference between the controlled rate and the contract rates, because the honest trader could not possibly allege that the goods were worth more to him than the controlled rate, because he could have sold them in the Black market. The dishonest trader could make such a suggestion but surely the quantum of damages cannot depend upon whether the buyer happens to be an honest or a dishonest trader. It seems to me that Sinha J. was wrong in the view he took that this award could not be challanged even if no question of extension of the due dates of delivery could be raised."

In Award Case 92 of 1947 *Tolaram Nathmal* v. *Ganesh Commercial Co Ltd.* (1), the dispute was with regard to September, 1946 delivery. The buyers claimed damages on the basis of the price on October 1st 1946. They justified their claim on the basis of the general law as also on the basis of the rule of the Gunny Traders Association. The sellers in their last statement contended that the buyer would not claim on the basis of the price on a day beyond the date of the breach and that was the law of the country and also the practice and usage of trade. Das J. held that all the statements must be read together and so read the issue of trade usage was plainly raised and the arbitrator was competent to decide this issue and refused to set aside the award. The judgment of Das J. was affirmed in Appeal from Original Order No. 6 of 1948 *Tolaram Nathmal* v. *Ganesh Commercial Co. Ltd.* (2).

It is desirable that I should also briefly review the earlier decisions of this Court dealing with the question whether the Bengal Chamber is entitled to decide disputes without taking evidence having regard to its Arbitration Rules. The present set of Rules was adopted in 1941, but the Bengal Chamber had substantially similar rules before that date. In *Hurdwary Mull* v. *Ahmed Musaji Selaji* (3), the Firm against which the claim was made contended that it was differently constituted from the Firm which had entered into the contract. The Bengal Chamber took legal advice and refused to entertain this objection. Fletcher J. held that the Bengal Chamber inspite of such rules

(1) Unreported judgment of *Das J.* in Award Case No. 92 of 1947.
(2) Unreported judgment in A.O.O. 6 of 1948.
(3) (1908) 13 C.W.N. 63.

CIVIL.

1951.

Bejoy Singh Karnwat. v. Bilasroy & Co.

*R. S. Bachawat, J.*

could not decide this objection without taking evidence and that the award was bad on the face of it because it was made against a firm and there was nothing to show who the members of the firm were. It seems that the Bengal Chamber refused to adjudicate upon and an issue which Fletcher J., considered to be material and in that sense they may be said to be guilty of misconduct. It is not quite clear whether a request had been made to the Bengal Chamber to take oral evidence. It is also to be borne in mind that the decision was dissented from in *Louis Dryfus & Co.* v. *Purusottum Das Narain Das* (1), where Rankin J. held that an award could be made against a firm and was not bad on the face of it because it was so made and was also dissented from on another point in *Bombay Co. Ltd.* v. *National Jute Mills Co. Ltd.* (2). In *Chaitram Rambilas* v. *Bridhichand* (3), the failure of the Bengal Chamber to take evidence was challenged on the ground that its rules did not bind the parties to the contract. This contention was rejected and the Court of Appeal held that the rules formed part of the contract and were binding upon the parties. To the same effect was the judgment of Chowdhury J. in *Nobin Chandra* v. *Sinclair Murray & Co.* (4). In *Radha Kissen Khetry* v. *Luchmi Chand Jhawar* (5), a case where the Bengal Chamber had been requested to take oral evidence. Rankin J. at page 153 of the report observed as follows:—

> "If oral evidence beyond the mere proof of documents of which the factum is not disputed is on the face of the written cases relevant and admissible, I think that upon those rules a refusal to hear such evidence would be very difficult to support except perhaps upon such question as market values as to which the arbitrators may themselves be entitled to act on their own expert knowledge or (under Rule 17) that of others. I think, however, this case fails to satisfy the condition which I have stated. The letter of the 28th May to the Tribunal must be read with reference to the buyer's case and as an offer of irrelevant and inadmissible evidence only, coupled with the argument of counsel."

(1) (1919) I.L.R. 47 Calc. 89.
(2) (1918) I.L.R. 39 Calc. 669.
(3) (1915) I.L.R. 42 Calc. 1140.
(4) [1914] A.I.R. Calc. 818.
(5) [1920] A.I.R. Calc. 150.

The judgment, was set aside by the Appeal Court on another ground but the Appeal Court did not deal with the point decided by Rankin J. In *Bhicanchand Ghororia* v. *G. & M. Fogt* (1), the Appeal Court held that the Bengal Chamber of Commerce was justified in refusing to hear evidence with regard to market rates but they also observed that occasions might arise where it would be clearly misconduct on the part of the Bengal Chamber of Commerce to refuse to hear oral evidence. In *Chandrabhan* v. *Ganpatrai & Sons* (2), the Bengal Chamber had taken no evidence but Blagden J. refused to set aside the award. He held that by section 1 of the Evidence Act, arbitrators were not bound by the rules of evidence, and under its rules the Bengal Chamber could decide on the statements filed before it.

On the authorities it appears to me that where there is a serious dispute about a matter which is peculiar to the parties and is not common to the trade, the Bengal Chamber of Commerce would be guilty of misconduct if they refuse to take evidence inspite of request by the parties to take such evidence. Even where no request is made by the parties, if on the document disclosed by the claimant it appears that he has really no case, the chamber would be guilty of misconduct if they proceed to make an award in favour of the claimant without calling upon him to substantiate his case by oral evidence. In that case the Chamber may be said to be guilty of misconduct on the ground that they did not really apply their minds to the facts of the case and that their award is perverse. But in a case where the award could not be said to be perverse and there was no request by the parties asking the Bengal Chamber to take evidence I am firmly of the opinion that the Bengal Chamber are not guilty of misconduct if they decide the dispute without taking oral evidence. The parties have agreed to be bound by the rules which authorise the Chamber to decide the dispute normally on the written statements and summarily. In a normal case if the chamber in the exercise of the power so conferred by the parties choose to decide the disputes summarily on such statements they cannot be said to commit any breach of duty. It would be throwing monstrous burden upon the Bengal Chamber to hold that in such a case it is their duty *suo muto* to call upon the parties to give evidence. The Bengal Chamber may well have thought

(1) (1926) 44 C.L.J 222.
(2) [1943] I.L.R. 1 Calc. 156.

CIVIL.

1951.

Bejoy Singh Karnwat.
v.
Bilasroy & Co.

R. S. Bachawat, J.

that the parties have left it to them to decide the disputes summarily on the perusal of the written statements filed before them.

The decisions of this court appear to establish the following propositions:—

(a) The ordinary measure of damages for non-delivery under a contract of sale of goods is the difference between the contract price and the market price on the date of breach of the contract: *Jamal* v. *Moolla Dawood* (1).

(b) The difference between the contract price and the market price on the date following the date of the breach of the contract is not the correct measure of damage for non-delivery under such contract: *Bajranglal Laduram* v. *Ganesh Commercial Co.* (2), even if there was no market for the goods on the date of the breach. *Tolaram Nathmal* v. *Bilasroy* (3). Whether and how far *Pannalal Sagormul* v. *Mukhram Radhakissen* (4), is inconsistent with these cases may have to be decided by the Court on some future occasion.

(c) If the date of breach is a date when the Jute Price Control Order was in operation the ordinary measure of damages is the difference between the contract price and the maximum price fixed by the Control Order. Any claim in excess of such difference is illegal and in contravention of the Control Order and the arbitrators are guilty of misconduct if they recognise and allow such claim whether the claim is on the basis of an illegal market price on the date of the breach. *Khusiram Benarshilal* v. *Giridharilal Dharamchand* (5); *Raghunath & Son*

(1) (1915) L.R. 43 I.A. 6.
(2) (1949) 55 C.W.N. 147.
(3) Unreported judgment in A.O.O. No. 180 of 1949.
(4) (1922) 39 C.L.J. 77.
(5) Unreported judgment in A.O.O. No. 80 of 1949.

v. *A. R. Md. Umer & Co.* (1); *Chogmal Rawatmal* v. *Sankalchand G. Shah & Co.* (2); or on the basis of the price on a subsequent date when the Jute Price Control Order ceased to be in operation: *Bajranglal Laduram* v. *Ganesh Commercial Co.* (3), even if there was no market for the goods on the date of breach and the first free market was on a subsequent day. *Tolaram Nathmal* v. *Bilasroy & Co.* (4).

(d) When the allegation is that the due date stood extended until after September 30, 1946 which is the date of expiry of the Jute Price Control Order either by agreement and/or assurances of delivery or by a usage of the trade the claim for difference on the basis of the price prevailing after such date is not illegal. *Khusiram Benarshilal v. Sagarmal Bhanraj* (5); *Srikissen Biriwala* v. *Harikissen Sadani* (6).

(e) In a contract of reference to the arbitration of the Bengal Chamber of Commerce the rules of the Chamber are imported into the contract and the parties are bound by the rules under which the Chamber can decide the dispute without taking oral evidence. *Chaitram Rambilas* v. *Bridhichand* (7). *Chandrabhan* v. *Ganpatrai & Sons* (8). The written statements of the parties before the Bengal Chamber are in the nature of evidence upon which the Chamber can make their award. *Lachminaran* v. *Khusiram Benarshilal* (9); *Mukhram Benarshilal* v. *Sagarmal Bhanraj* (10).

(1) Unreported judgment in A.O.O. No. 127 of 1948.
(2) (1949) 53 C.W.N. 828.
(3) (1949) 55 C.W.N. 147.
(4) Unreported judgment in A.O.O. No. 180 of 1949.
(5) Unreported judgment in Award Case No. 159 of 1948.
(6) Unreported judgment in Award Case No. 82 of 1948.
(7) (1915) I.L.R. 42 Calc. 1140.
(8) [1948] I.L.R. 1 Calc. 156.
(9) Unreported judgment in A.O.O. No. 2 of 1949.
(10) Unreported judgment in Award Case No. 159 of 1949.

CIVIL.

1951.

Bejoy Singh Kamwar
v.
Bilasroy & Co.

R. S. Bachawat, J.

(f) Inspite of the rules of the Bengal Chamber in a proper case it is the duty of the Chamber to take evidence. *Bhicumchand Chororia* v. *G. & M. Fogt.* (1). The power not to take evidence involve a duty to take evidence when the circumstances demand it.

(g) The Arbitration Tribunal of the Bengal Chamber of Commerce being experts in the trade may decide on a question which is common to the trade without taking evidence, such as the market price: *Bhican Chand Chororia* v. *G. & M. Fogt.* (1); or usage of trade: *Balabux Agarwalla* v. *Ramdeo Satyanarain* (2). The Chamber can decide a custom of automatic extension of the due date without taking evidence. *Tolaram Nathmal* v. *Ganesh Commercial Co.* (3); *Tolaram Nathmal* v. *Bilasroy & Co.* (4).

(*h*) If there is a serious dispute as to any material fact which is peculiar to the parties and not common to the trade e.g. whether or not there has been oral extension of the due date of the contract and the parties offer to call relevant and admissible evidence or request the Bengal Chamber to give opportunity for the calling of such evidence it is the duty of the Bengal Chamber to take such evidence and to allow such evidence to be called. *Radhakissen Khetry* v. *Luchmi Chand Jhawar* (5).

(i) Even if there is a dispute between the parties on a matter of fact peculiar to the parties e.g. a dispute whether or not there was oral extension of the due date, the Arbitrators are ordinarily justified in deciding such dispute upon the written statements and without calling oral evidence in the absence of any request from the parties to take oral evidence. *Re*: *Arbitration Sree Kissen Beriwala* v.

(1) (1926) 44 C.L.J. 422.
(2) Unreported judgment in A.O.O. 48 of 1946.
(3) Unreported judgment in A.O.O. 6 of 1948.
(4) Unreported judgment in A.O.O. 180 of 1949.
(5) [1920] A.I.R. Calc. 150 (153).

*Naraindas Ganeshilal* (1); *Re: Arbitration Srikissen Beriwala* v. *Harikissen Sadani* (2); *Mukhram Lachminarain* v. *Khusiram Benarshilal* (3).

(j) Even in the absence of any request by the parties to take oral evidence when the statements of the claimant discloses that he has no case it is the duty of the Bengal Chamber to call upon the claimant to substantiate his case by calling oral evidence and if an award is made without calling such evidence the award is perverse and ought to be set aside: *Khusiram Benarshilal* v. *Mathuradass Goverdhandass* (4). Before the Court can say that the award is perverse a very special and strong case must be made out: *Mukhram Lachminarain* v. *Khusiram Benarshilal* (3); *Srikissen Beriwala* v. *Naraindas Ganeshilal* (1).

In the present case the claim is made on the basis of a repurchase on October 1, 1946. The claim is also made alternatively on the footing of the difference between the contract price and the price prevailing on October 1, 1946. There is an allegation of extension of the due date. The claim, therefore is a claim for award of legal damages, and cannot be said to be in contravention of the Jute Price Control Order. I am therefore unable to hold that the award is against public policy and illegal on the principle of *Mohamed Umer's Case* (5).

As I read the statements there is plainly an averment of extension. There is an allegation that there was an assurance by the sellers that they would deliver the goods on receipt thereof from their sellers. In *Mukhram Lachminarain* v. *Khusiram Benarshilal* (3), there were substantially similar allegations and they were held to be sufficient allegations of oral extension of the due date. The statements are not technical pleadings and are to be construed liberally; *Tolaram Nathmal* v. *Ganesh*

(1) Unreported judgment in Award Case No. 59 of 1948.
(2) Unreported judgment in Award Case No. 81 of 1948.
(3) Unreported judgment in A.O.O. No. 2 of 1949.
(4) (1948) 52 C.W.N. 826.
(5) Unreported judgment in A.O.O. 127 of 1948.

CIVIL.

1951.

Bejoy Singh Karnwat v. Bilasroy & Co.

R. S. Bachawat, J.

*Commercial Co.* (1) In *Hurnandrai* v. *Pragdas* (2), the judgment of the Judicial Committee proceeds upon the assumption that the contract may provide for delivery of the goods as and when the same is received from the mills. The allegation here is not that the contract was extended up to September 30, 1946, but that by reason of the assurances of the petitioner the contract was extended until the goods could be available in the free market or it was possible to assess the damages. It was for the Arbitrators to decide upto what point of time there was an extension. It was for them to decide whether the due date was extended until September 30, 1946, or whether it was extended upto October 1, 1946. Furthermore, in this case there was no request by either of the parties calling upon the Arbitrators to take evidence. It is impossible to say that the Arbitrators could not as reasonable men decide as they did. There was evidence that the petitioners sellers had failed to give delivery of the goods to the petitioner with the result that the petitioner may well have assured the respondent that the goods would be delivered on its receipt from the petitioners buyers. The Chamber could also take into account the fact that there was no reply by the petitioners to the letters dated the 7th and 18th October, 1946, whereby the respondent asserted re-purchase and claimed damages and the reason may well have been that the petitioner had no answer to the claim then made by the respondent. Prior to the Arbitration proceedings the petitioner never protested that he had no concern with the re-purchase by the respondents buyers. The rules of the Bengal Chamber of Commerce empower the Chamber to decide on the statements which had been filed before them. In the exercise of their discretion they have decided the disputes on such statements without taking any oral evidence. It seems to me that it cannot be said that the Bengal Chamber acted unreasonably or was guilty of misconduct in any way.

It is true that in the first statement which was filed before the Arbitrator there was no allegation of extension, but the allegation is clearly made in the second statement of the respondent, and the petitioner had an opportunity of meeting that allegation. As observed by Das J. in *Re: Arbitration Tolaram*

(1) Unreported judgment (Das J.) in Award Case No. 92 of 1947.
(2) (1928) L.R. 50 I.A. 9.

CIVIL.

1951.

Bejoy Singh Karnwat.
v.
Bilasroy & Co.

R. S. Bachawat, J.

*Nathmul* v. *Ganesh Commercial Co.* (1). It will be taking a too narrow view of arbitration proceedings to say that the claimant must be strictly confined to the allegations made in the first statement. All the statements are before the Arbitrators and should be read together.

Mr. Meyer also contended that there was an error of law and such error appeared on the face of the award. Mr. Meyer contended that the finding in paragraph 1 of the award that there was no free market on the contract due dates and the first free market available thereafter was October 1, 1946, is the basis of the award and as that finding is not sufficient to support the award there is an error of law on the face of the award. This contention must be rejected. The error of law on the face of the award must be some legal proposition which is the basis of the award and which is erroneous and which can be found in the award or in a document actually incorporated therewith. It is not permissible to refer to any other document to show that the award is erroneous: *Champsay Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co., Ltd.* (2), *Saleh Mahomed Umer Dossal* v. *Nathoomal Kessamal* (3), and *Durga Prasad Chamaria* v. *Anardeyi Sethani* (4). No legal proposition is stated in the present award and it cannot be said that there is an error of law on the face of the award. Besides the legal proposition must be plainly stated and the Court cannot act upon a mere surmise that the Arbitrator was acting upon a supposed legal proposition. In *James Clark (Brush Materials) Ltd.* v. *Carters (Merchants) Ltd.* (5), the award was "freight space was not obtainable within the period defined in the contract and I award that the contract be forthwith dissolved without penalty or allowance to either party." Tucker J. observed as follows:—"I think Mr. Devlin is right when he contends that it is not right for me to read words into this document but must take it at its face value. Mr. Hodgeon says that I should draw from the document the inference that the award is based only on this finding. I do not think, however, that I am entitled to draw any inference. To my mind I must look at it to see if it says that the award is based

(1) Unreported judgment (*Das J.*) Awar Case No. 93 of 1947.
(2) (1928) L.R. 50 I.A. 324.
(3) (1927) L.R. 54 I.A. 427.
(4) (1946) 50 C.W.N. 880.
(5) [1944] L.R. K.B. 566.

CIVIL.

1951.

Bejoy Singh Karnwat v. Bilasroy & Co.

R. S. Bachawat, J.

on this finding alone. If it does not so state it appears to me to be impossible for me to draw any inference one way or the other. * * * * * This would in itself be sufficient reason for my holding that I have no jurisdiction to accept or set aside the award even if I suspect or am inclined to think that it was highly probable that the finding stated was the foundation for the award."

In *S. C. Nordlinger* v. *Chandmull Mulchand* (1), the award was that as the buyers were unwilling to produce the bales required for inspection their claim could not be upheld. The Appeal Court refused to set aside the award and observed as follows:—"The learned Judge seems to have thought that the Arbitrators had decided against the buyers relying upon the mere fact that the buyers were unwilling to produce the bales. In my judgment with great respect to the learned Judge that is not a legitimate inference to be drawn from the terms of the award. The arbitrators said that they had certain papers I am not in a position to say what these papers were or to speculate what their contents were. They certainly had some materials before them which were contained in the papers referred to in the award."

I, therefore, hold that there is no error of law on the face of the award.

In the petition the award was also challenged on the ground that the Arbitrators had exceeded their jurisdiction in coming to a finding as to free market in the award. Mr. Meyer did not press this contention before me, and in my judgment rightly so.

The result is that this application must be dismissed with costs.

*Messrs. Khaitan & Co.*: Solicitors for the Applicant.

*Messrs. Dutt & Sen*: Solicitors for Respondents.

S.K.R.C. *Application dismissed.*

(1) (1924) 28 C.W.N. 888.

## ORIGINAL CIVIL.

*Before Mr. Justice P. B. Mukharji.*

S. B. TRADING CO. LTD. CIVIL.

1951.

*April, 20.*

*v.*

SHYAMLAL RAMCHANDRA.*

*Suit for ejectment—Statutory forfeiture under Section 12(3) of the Rent Act of 1948—Suit pending on 30th March 1950 or 30th November 1950—No notice to quit given—Suit not rendered incompetent.*

*West Bengal Premises Rent Control Act, 1950, Section 18(5)—If infringes fundamental right under Article 14 of the Constitution of India.*

*Legislation, not possible—Without some kind of classification or discrimination.*

*Rent Act 1950, amended section 18(5)—Interpretation of—Attracts proviso to Section 14 of that Act—To be strictly construed and confined only to default contemplated in Clause (1) Section 12(1) of the Rent Act, 1950.*

*Proviso in a section of the Statute—Does not alter the substance of the law—Substance, to be gathered from the Section including the proviso.*

A suit on the ground of statutory forfeiture under section 12(3) of the Rent Act of 1948, pending on the 30th March, 1950 or 30th November, 1950, is not rendered incompetent by the West Bengal Premises Rent Control (Amendment) Act, 1950, on the ground that no notice to quit is given or pleaded in such suit.

Section 18(5) of the Rent Act of 1950 as amended does not infringe the fundamental right under Article 14 of the Constitution of India.

The frontiers of the constitutional doctrine of "equality before the law" or of "equal protection of the laws" shade off imperceptibly into the region of legislative policy. This constitutional guarantee is not intended to invade the policy consideration of the legislature.

No legislation in any practical sense is possible without some kind of classification and some kind of discrimination. The very nature and purpose of every legislation depend on the choice of some subject or others, to the exclusion of the rest and some arena for its operation. This selective quality is inherent and implicit in every legislation. This fundamental guarantee

* Original Civil Suit No. 4828 of 1949.

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

of the 14th Article of the Constitution should not be construed in such a manner as to make legislation impossible for all practical purposes.

The legislature is free to classify tenants who incurred statutory forfeiture of their tenancies and it is free to choose to grant them relief where suits are pending against them on that ground.

Primary legislation which is not retrospective and enjoying the amplitude of wide classificatory powers raises comparatively simpler problems. But in the case of retrospective legislation, that power has to be textured by the fact of existing law and rights acquired and obligations incurred thereunder, so that particular caution is required to see that the retrospective legislation, when piecemeal and fragmentary as the Amending Act, does not create a situation whereby similarly circumstanced individuals or classes, subject to the same legislation, are found to be not equal before the law or do not receive the equal protection of the laws.

*Chiranjitlal* v. *Union of India* (1), referred to.

The law contained in Section 18(5) of the Rent Act 1950 as amended is not an unreasonable law and cannot be said to infringe Article 19(1) (f) of the Constitution read with sub-article 5 thereof.

*Julius Block* v. *Louis Hirsh* (2), referred to.

Under the Rent Act of 1948 a Rent Controller has no jurisdiction to decide the standard rent if the application is not from either a landlord or a tenant. A tenant who had suffered statutory forfeiture under that Act could not apply to fix the standard rent thereunder.

*Rex* v. *London Tribunal* (3), *Bunbury* v. *Fuller* (4), and *Rex* v. *Lincolnshire Justices* (5), referred to.

A proper interpretation of Amended Section 18(5) of the Rent Act, 1950, does attract the proviso to Section 14 of that Act but that proviso to Section 14 must be strictly construed and must be confined only to the default contemplated in Clause (i) of Section 12(1) of the Rent Control Act, 1950 and not to defaults which are inevitable as a result of statutory forfeiture under the Rent Act of 1948 by which such tenants could neither pay nor deposit rent during the period from the 30th March 1950 to the 30th November 1950. Such a default can never occur in the case of a statutory forfeiture under Section 12(3) of Rent Act of 1948.

*S. K. Choudhuri* v. *Jai Kumar Sarkar* (6), *Amarnath Misra* v. *Sreenarayan Mansinghka* (7), referred to.

(1) [1951] A.I.R. S.C. 41.
(2) (1921) 256 U.S. 135.
(3) [1951] W.N. 34.
(4) (1853) 9 Ex. Rep. 111 (140); 156 E.R. 47 (60).
(5) [1916] 2 K.B. 192 (201).
(6) (1950) 55 C.W.N. 75.
(7) (1950) 54 C.W.N. 617; 87 C.L.J. 4.

Proviso in a Section of the Statute is only a manner of expression and does not alter the substance of the law which has always to be gathered from the Section as a whole including the proviso.

CIVIL.
1951.
S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

Suit for ejectment of the Defendant from room No. 209 on the ground floor of 57, Clive Street, Calcutta, now Netaji Subhas Road, on the ground of *ipso facto* determination of the tenancy under Section 12(3) of the Rent Act of 1948.

The material facts will appear from the judgment.

*Mr. A. K. Sen,* Jr. Standing Counsel and *Mr. S. Roy* for the Plaintiff Company.

*Mr. Sadhan Gupta and Mr. Yusuf Jamal* for the Defendant.

*Sir S. M. Bose,* Advocate General, *Amicus Curiae.*

The judgment of the Court was as follows:—

**P. B. Mukharji, J.:**—The validity of the recent amendments of the Rent Act of 1950 under the Constitution and specially the interpretation of Section 18(5) of that Statute as amended are the important questions of controversy in this suit. *April, 20.*

The plaintiff company instituted this suit on the 17th December, 1949, claiming ejectment of the defendant from room No. 209 on the ground floor of 57, Clive Street, Calcutta, now Netaji Subhas Road, on the ground of *ipso facto* determination of defendant's tenancy under Section 12(3) of the Rent Act of 1948 for the failure to pay or deposit three consecutive months' rent under that Act at the rate of Rs. 91/- per month. These three months are Agrahayan, Pous and Magh of the Bengali calendar year 1355 B.S. corresponding to the period from 17th November, 1948 to the 12th February, 1949 in the English calendar. No notice to quit is pleaded in the plaint because under Section 12(3) of the Rent Act of 1948, it was provided that upon such failure to pay or deposit rent, the interest of the tenant was "*ipso facto* determined." I will refer hereinafter to *ipso facto* determination as statutory forfeiture.

The defence raised in the written statement of the defendant is that rents of Agrahayan and Pous were duly sent to the

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

P. B. Mukherji, J.

plaintiff by Money Order and the plaintiff accepted the same and thereafter on plaintiff's refusal, deposit was made regularly with the Rent Controllor. In addition, the plea in the Written Statement is that by order of the 2nd Additional Rent Controllor in Case No. 3500A of 1949 and dated the 22nd December, 1949, the rent was reduced to Rs. 35/- per month with effect from the month of October, 1949. Deposit has been made at this reduced rate of Rs. 35/- per month.

There are two admitted briefs of documents and correspondence in this suit—one is marked Ex. "A" and other marked Ex. 1. There is another admitted document setting out the particulars of payment of rent and electric charges month by month, amounts of payment, and months for which such payments were made along with the dates of payment. This document is marked Ex. "D" in the suit.

An attempt was made by the defendant to lead evidence by calling one Mohanlal Gupta but was given up. The suit has proceeded only on the admitted documents without any oral testimony.

A preliminary point was taken by Mr. Sadhan Gupta, Counsel for the defendant that the suit is not maintainable without notice to quit, regard being had to the Rent Act of 1950 as amended by the Amending Act. Mr. Gupta's contention is that the suit was filed when the Rent Act of 1948 was in operation on the ground of statutory forfeiture of tenancy without notice to quit. The Rent Act of 1950 as amended has avoided the statutory forfeiture and therefore, notice to quit is now necessary. I am unable to accept that argument.

Neither the Rent Act of 1950 nor the amendment thereof, in my judgment, requires notice to quit in suits pending at the commencement of such Act on the ground of statutory forfeiture under Section 12(3) of the Rent Act of 1948. The Rent Act of 1950 has abolished the statutory forfeiture of tenancy and the amendment gives relief to such tenants where a suit was pending against them on the ground of such statutory forfeiture. But the language of the statute of 1950 or of its amendment does not according to my interpretation, lead to the conclusion that such

suit should fail because no notice to quit was given. The Rent Act, 1950, or its amendment does not make pending suits, on the ground of statutory forfeiture, incompetent because of the absence of the notice to quit. They only give certain reliefs to such tenants. Indeed, if it were otherwise, most of these pending suits would have failed on that ground alone and perhaps no such controversial provision like Section 18(5) of the Rent Act, 1950 as amended need have been made at all. But the real answer is that a proper construction of the Statute and its amendment does not require either explicitly or even by necessary implication that a notice to quit must be served in such cases.

I, therefore, overrule this preliminary objection.

Mr. Gupta raised thereafter two issues for determination in this suit. They are:—

(1) Is the defendant entitled to relief under Section 18(5) of the Rent Act of 1950 as amended by the Amending Act?

If so, what relief?

(2) Was the order dated the 22nd December, 1949, of the Second Additional Rent Controller in case No. 3500A of 1949 without jurisdiction?

If so, are deposits under such order sufficient to save the default?

Issue 1.

The arguments on this constitutional issue can be broadly classified for their proper appreciation.

The first and foremost argument is that Section 18(5) of the Rent Act, 1950, and the amendment thereof are *ultra vires* the Constitution on the ground:—

(a) Of infringement of the guarantee of "equal protection of laws" or "equality before the laws" as provided in Article 14 of the Constitution;

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukharji, J.*

(b) Of being unreasonable within the meaning of Sub-Article 5 of Article 19 read with Article 19(1) (f) of the Constitution.

On both these grounds Section 18(5) of the Rent Act of 1950 as amended is said to be void under Article 13 of the Constitution.

The West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, came into force on the 30th March, 1950 and by Section 45 thereof repealed the Rent Control Act of 1948. Section 18 of the Rent Act of 1950 made provisions for granting relief to "tenants" against whom decrees were made or suits were pending on the 30th March, 1950 "on the ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control Act, 1948." This Court held that these provisions did not give any protection to the persons who forfeited their interest as tenants under Section 12(3) of the Rent Act of 1948. See *Manik Lal* v. *S. Dobiruddin* (1), and *S. B. Trading Co. Ltd.* v. *Satyendra Chandra Sen* (2).

As a result of these decisions of the High Court, the West Bengal Legislature amended the statute. The amending statute is the West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act, 1950, being West Bengal Act XVII of 1950. I shall refer to this Act as the Amending Act. The Amending Act came into operation on the 30th November, 1950. Apart from changing the definition of tenants, the Amending Act made a substantial and elaborate alteration in Sub-sections (1) and (5) of Section 18 of the Rent Act of 1950 by substituting altogether one class of tenants for another class. This is done by section 4 of the Amending Act.

Article 14 of the Constitution guarantees every person equality before the law or equal protection of the laws. This Article has received the authoritative interpretation from the Supreme Court in *Chiranjitlal* v. *Union of India* (3). The effect of the majority decision in that case is that while Parliament or Legislature has wide discretion in creating classes on

(1) (1950) 54 C.W.N. 572.
(2) (1950) 86 C.L.J. 46.
(3) [1951] A.I.R.S.C. 41.

which the legislation will operate, no classification is permissible which is arbitrary and which is made without any basis and that a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed. Mukherjea J. with whose views on this point the learned Chief Justice of India agreed in explaining the law on the subject at pages 57-58 of that Report observed in particular:—"In other words, there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is the same." The observation of Fazle Ali J. at pages 44-45 of that Report are also in support of this view.

In the light of the law as laid down by the Supreme Court, I have now to consider how far the Amending Act offends against this fundamental right of equality before the law or equal protection of the laws.

The effect of the Rent Act of 1948 was to divide the tenants into two broad classes. One class was the ordinary defaulters who failed to pay or deposit rent for one or two months. The other class was represented by tenants who defaulted in paying or depositing rents for three consecutive months or more. I will refer to the former class as the *short-term* defaulters and the latter class as *long-term* defaulters. This Act of 1948 was a law before the Constitution and naturally, no constitutional doctrine of 'equal protection of the laws' or 'equality before the law' affected such statutory provision.

The Rent Act of 1950, however, gave relief only to short-term defaulters but excluded the long-term defaulters. Such differentiation as to relief to my mind assumes and proceeds on a classification which is unobjectionable. It satisfies the test laid down by the Supreme Court and cannot, in my judgment, be said to be "arbitrary" or "without any basis" and in my view it bears "a reasonable and just relation to the things in respect of which it is proposed."

But the amending Act reverses the entire situation. The direct result of the amendment is that short-term defaulters are denied relief while long-term defaulters are afforded protection,

CIVIL.
1951.
S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.
P. B. Mukherji, J.

To prefer long-term defaulters to short-term defaulters is to indulge in eccentricity and would appear to be repugnant to all commonsense. Mere eccentricity however or even lack of commonsense does not make a statute unconstitutional, provided such eccentricity or lack of common sense does not travel beyond the limits of reasonableness under sub-articles 3 to 6 of Article 19 of the Constitution where they apply. The privilege of eccentricity and the presumption of wisdom alike belong to the legislators. For the Court however the question has to be judged in this case by the test whether the statute creates an unjustified classification which infringes the guarantee of the 14th Article of the Constitution.

If the principle of differentiation or classification is longer or shorter default in payment of rent, then it is difficult to escape from the conclusion that the law whose direct result is protection of long-term defaulters and penalisation of short-term defaulters is arbitrary and does not bear a reasonable and just relation to the things in respect of which the legislation is made. But that is not the principle of classification which to my mind is the true criterion by which this Amending Statute or even the parent Statute should be judged in this case. I will discuss the principle of classification which, in my opinion, is the true basis of the impugned legislation, after I have set out the arguments in support of the unconstitutional character of this legislation.

I will now chronicle and enumerate the arguments advanced in support of the contention that the amendments of Section 18 of the Rent Act, 1950, infringe the constitutional guarantee of "equality before the law" or the "equal protection of laws."

I. Under the amended Section 18(1) if the application is pending on 30-11-50 at the date of the amendment, the relief proposed by the amendment is granted in respect of decrees before 30-3-50 and made on the ground of statutory forfeiture, but if the application had been made between 30-3-50 and 30-11-50 and dismissed on the ground that the very same class of tenants was not within the bounty of unamended Section 18(1), then no relief can be allowed to such unfortunate victims as the limitation of the sixty days from 30-3-50 having already expired, successfully prevents them from availing of the amendment.

Civil.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ram-Chandra.

P. B. Mukherji, J.

II. Then again, those very tenants whose tenancies were forfeited by operation of Section 12(3), Rent Act of 1948 who after being properly advised under unamended section 18(1) did not make any application thereunder, are denied relief under the amendment. Because the limitation under the amended Section 18(1) having already expired at the date of the amendment, they are left with no scope for making any application thereunder. Yet the amendment is linguistically and verbally expressed to be for the benefit of the same class of tenants who incurred statutory forfeiture under Section 12(3) of the Rent Act of 1948. The learned Advocate-General appearing as *amicus curiae* describes this sub-section as "sheer nonsense" and stated that the legislature had forgotten to alter the period of limitation. Such obvious lapse can only be the result of utter carelessness that today prevails in drafting statutes.

The results therefore in either of the two cases I and II above are contended to be that among the same class of tenants under statutory forfeiture against whom decrees for ejectment had been passed, there is no equal "protection of the laws" or any "equality before the law" and it is therefore argued to be a violation of the guarantee of 14th Article of the Constitution.

III. Thirdly, a discrimination is made among the decree-holders before and after 30-3-50 although such decrees are on the very same ground of statutory forfeiture. Decrees made on such ground before 30-3-50 and where amended Section 18(1) can be made applicable must under compulsion be reopened, the language of the Statute being "shall," whereas similar decrees passed on the very self-same ground, but after 30-3-50 may or may not at the discretion of the Court be reopened, the language of the Statute being "may." The recent decision of the Court of Appeal in *Satyendra* v. *S. B. Trading Co. Ltd.* (1), makes it clear. It is therefore contended that the decree-holders of the same class are equal before the law and do not receive the equal protection of the laws. To this the answer is given that these decree-holders are not similarly circumstanced because the date of 30-3-50 provides the dividing line and therefore such classification is justified. To that the rejoinder is given that the amendment was made on 30-11-50 with retrospective effect so that on 30-11-50 the differentiation between decrees of the same class by the date 30-3-50 is arbitrary and cannot be said to bear

(1) (1951) 55 C.W.N. 309.

CIVIL
1951.
S. B. Trading Co., Ltd. v. Shyamlal Ram-Chandra.
P. B.

any just and reasonable relation to the subject-matter of the legislation.

IV. The next argument is that those ordinary short-term defaulter tenants against whom decrees were made before the amendment and who applied within the specified time thereunder but whose applications remained undisposed of at the date of the Amending Act are prevented from continuing their applications under amended Section 18(1) by reason of sections 5 and 6 of the Amending Act not applying to such cases. But the same class of tenants who had the chance of having their applications disposed of before 30-11-50 got the relief. Yet the amending Act is made retrospective from 30-3-50 although passed on 30-11-50. The amendment therefore is contended to be not only discriminatory between the same class of tenants but is said to be hostile legislation.

V. Under unamended Section 18(5), the ordinary short-term defaulter tenants obtained relief in pending suits and decrees made in their favour between 30-3-50 and 30-11-50 cannot be affected because Section 6 of the Amending Act only applies to decrees for recovery of possession but the same class of tenants whose suits could not be disposed of during the period of 30-3-50 and 30-11-50 is now denied relief, although the Amending Act was passed on 30-11-50 and made retrospective. This result again is said to be discriminatory between the same class of tenants and is said to be arbitrary and without any rational basis.

VI. Again, when a suit had been decreed and appeal filed against such decree before 30-3-50 and when such appeal is pending on 30-11-50 at the date of the amendment, relief must be given under the amended Section 18(5) of the Act to the class of tenants who suffered statutory forfeiture of their tenancies by the Rent Act of 1948 and so decreed. But if the same decree was appealed against after 30-11-50, so that the appeal was not pending on 30-11-50 but was say filed a day or two after on 1-12-50, then the same class of tenants can get no relief under amended section 18(5) of the Rent Act of 1950 because of the words therein "if at the date when the Act comes into force." and because of the words "pending at the commencement of

this Act" and "at such commencement" in Section 5 of the Amending Act. This again is argued to be a discrimination which does not bear a just and reasonable relation to the subject in respect of which the legislation is made especially when such legislation is passed on 30-11-50 and made retrospective from the prior date of 30-3-50.

I have given my most careful and anxious consideration to each one of these arguments. Force and reasonableness of these arguments and their seeming plausibility made me ponder long for their consideration. There can be no doubt that this amendment is a clumsy piece of legislation and it has produced results which do violence to every canon of commonsense. But I have however come to the conclusion that each one of these arguments, reasonable as they all are, and pointing as they do to unreasonable results of the amendment, represents a wrong approach to the constitutional issue of "equal protection of laws," or "equality before the law." On close scrutiny I discern in each of these arguments the fallacy of unequal comparison and such arguments fail to show inequality between similarly circumstanced individuals or classes.

Section 18(5) of the Rent Act of 1950 as amended proceeds first on the broad classification of pending suits. Then the class affected is not all pending suits but only such suits as are pending on the ground of statutory forfeiture of tenancy. Within this class of pending suits against such tenants, there is in fact no inequality as I will presently show. The underlying principle recognised in the amendment is that special consideration is to be given to those tenants who incurred statutory forfeiture by reason of Section 12(3) of the old Rent Act of 1948. These are the broad principles of classification on which the amended legislation proceeds. Section 18(5) of the Rent Act of 1950 as amended by the Amending Act is applicable only to pending suits of the particular class I have just mentioned. Among such pending suits, no discrimination is made by denying "equality before the law" or "equal protection of laws." They are all treated on the same and equal footing.

The arguments noted above on analysis will be found to suffer from the defect of attempted comparison between persons

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukharji, J.*

not equally situated or circumstanced. I will deal with the last two arguments first because they directly concern Section 18(5) of the Act as amended. In *argument V*, the comparison is not among tenants against whom suits are pending on the ground of statutory forfeiture but relates to ordinary short-term defaulter tenants and is one between pending suits and suits disposed of. But they represent distinguishing factors and such comparison cannot mean inequality in the same class. They are not similarly circumstanced individuals and if the effects are queer as indeed they are, even then they cannot be said to infringe the constitutional guarantee of "equal protection of laws" or "equality before the law." Then again, in *argument VI* the comparison is attempted between appeals pending on 30-11-50 and those not pending on 30-11-50 but filed thereafter and I do not see how they can be said to represent individuals or classes similarly circumstanced or similarly situated.

The other four arguments that I have noticed above, have more for their concern Section 18(1) of the amended Rent Act 1950. *Argument I* suffers from the same defect of attempted comparison between dissimilarly circumstanced individuals or classes. These applications pending on 30-11-50 are compared with applications disposed of before 30-11-50. They therefore cannot be said to be similarly situated. *Argument II* deals with the situation of those persons or tenants under statutory forfeiture who did not apply under unamended Section 18(1). But no inequality is created by this amendment as between these persons or tenants. All those who rightly did not make the application under unamended Section 18(1) are treated equally before the law. They cannot be said, in my view, to be similarly circumstanced or similarly situated with those who did make the application although wrongly. It would certainly have been more logical and sensible to include those mentioned in *argument II* for the plaintiff. But that is very different from saying that the statute is unconstitutional. *Argument III* similarly introduces factors which do not suggest equally or similarly situated individuals or classes. Decrees before and after 30-3-50 can be classified differently for the very important reason that the former was on the basis of Section 12(3) of the Rent Act of 1948 an existing law prevailing at the time, but the latter was after the new Rent Act of 1950 had come into force abolishing

statutory forfeiture of tenancy. What happened was this that although the Rent Act of 1950 removed the provision for statutory forfeiture of tenancy it failed to give relief it intended to give the judgment-debtors who suffered decrees on the ground of statutory forfeiture. That was the reason for the amendment and in that context to make the relief discretionary in the latter case was to give some recognition at least to the dealings on the basis of law as existing in the unamended Section 18(1), during its short career from 30-3-50 to 30-11-50. It therefore in my view cannot be said that this difference does not bear any just and reasonable relation to the subject of legislation. *Argument IV* suffers from the same defect inasmuch as it makes a comparison between persons not equally situated namely, those whose applications have been disposed of before the amendment and those which were pending at the date of the amendment.

The frontiers of the constitutional doctrine of "equality before the law," of "equal protection of the laws" shade off imperceptibly into the region of legislative policy. This constitutional guarantee is not intended to invade the policy consideration of the legislature. Legislative policy belongs to the domain of politics. The Courts are not concerned with the wisdom or folly of any legislative policy. Equally, on the other hand, in the name of legislative policy, the constitutional guarantee of equality before the law or of equal protection of the laws will not be allowed to be interfered with. A legislation that infringes this constitutional guarantee cannot be sanctified in the name of policy. The question very often is one of determining the balance between legislative policy and this constitutional guarantee. That balance is frequently delicate but upon it hangs all the difference between politics and constitutional jurisprudence, the theme of the legislatures and the theme of the Courts. Arguments on the subject very often miss the balance. This is the twilight domain. Here the light of the constitution fades into the darkness of the politics of legislative policy. This is where the Court halts. This is the terminus for the Courts. The arguments before me against the validity of the Statute have overstepped this terminus. The language of the 14th Article of the Constitution has all the delirious qualities of a slogan and a catchword which have the tendency to avoid and ignore the sober and true constitutional content of the guarantee. Legis-

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

P. B. Mukharji, J.

lative policy, inviolate save in the legislature itself, must however observe the constitutional bars provided in the Constitution. For instance, the legislature cannot, in the name of policy, discriminate by legislation on the ground only of race. The supremacy of legislative policy, as much as legislative power, must fit in and not override the Constitution.

The constitutional implication of this branch of the law is easily liable to be misunderstood, as indeed in my view, in fact has been misunderstood in the arguments made before this Court, challenging the validity of the Amending Act.

No legislation in any practical sense is possible without some kind of classification and some kind of discrimination. The very nature and purpose of every legislation depend on the choice of some subject or others, to the exclusion of the rest and some arena for its operation. This selective quality is inherent and implicit in every legislation. The constitutional guarantee of 'equality before the law' or of 'equal protection of the laws' cannot, therefore, be understood and construed in such a manner as to make legislation impossible for all practical purposes. Not all classification or discrimination is a breach of the constitutional guarantee of the 14th Article of the Constitution. Equality before the law or equal protection of the laws, therefore, means that the law being there, its application should be universal in every case which answers the description in the legislation. That other more desirable objects, which do not answer such legislative description, are left out of the operation of such legislation is, in my view, a matter of legislative policy and not a consideration which affects the constitutional doctrine of equality before the law or equal protection of the laws. The power to classify or particularise objects of legislation must, in the nature of things, be left as wide as possible to the law-making authorities. But the line is drawn so as to ensure that, other things being equal, the same and similarly-circumstanced persons who are subjects of the legislation, should be equal before such law and there should be, as between them, equal protection of the laws. If not, it is only then that such law is discriminatory in the sense of being an infringement of the guarantee of the 14th Article of the Constitution. It is in this sense that the constitutional doctrine of 'equality before the law' or of 'equal protection of

the laws' should be understood and it cannot be over-emphasised that in applying this doctrine no narrow dogmatic constitutional niceties should hamper the true exposition of the Constitution as a living practical instrument of government of men and affairs.

The legislature, in my view, is free to classify tenants who incurred statutory forfeiture of their tenancies and it is free to choose to grant them relief where suits are pending against them on that ground. That is a matter of legislative policy with which the courts are not concerned, and so long as within that class of tenants in pending suits no inequality or unequal treatment is made, such legislation is free from any unconstitutional taint on this ground.

Retrospective and retroactive legislation bears very materially on this constitutional question of 'equality before the law' or of 'equal protection of the laws.' Primary legislation which is not retrospective and enjoying the amplitude of wide classificatory powers raises comparatively simpler problems. Here in the case of retrospective legislation, that power has to be textured by the fact of existing law and rights acquired and obligations incurred thereunder, so that particular caution is required to see that the retrospective legislation, when piecemeal and fragmentary as the Amending Act, does not create a situation whereby similarly-circumstanced individuals or classes, subject to the same legislation, are found to be not equal before the law or do not receive the equal protection of laws. Such caution is required all the more when the retrospective legislation is not merely retrospective but also partially amendatory of the existing law or legal scheme. The danger is real in the case of an amendatory retrospective legislation because the integral picture of the law after the amendment is very often missed by reason of over-emphasis on the partial picture of amendment without the whole context. That is exactly what appears to have happened in this case producing absurd and queer results. Relief was certainly intended to be given to the tenants who forfeited their tenancies under Section 12(3) of the now-repealed Rent Act of 1948. But the method by which it appears to have been done is by a total substitution of one class for another with the resulting denial of relief to the former class who previously got the relief

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukherji, J.*

before the amendment. I have little doubt in my mind that the legislature did not intend to penalise the ordinary short term defaulters and deny them relief. It appears to me that this old result is due entirely to careless phrasing of the amendment. It has narrowly escaped from being unconstitutional, although producing results wholly inconsistent with common sense as will clearly appear from the arguments I have set forth in detail. I would only wish to record that although its validity is established, the absurdity of its illogical consequences will receive the immediate remedial attention of the legislature.

The next argument on the constitution is that Section 18(5) of the Rent Act, 1950, is not a reasonable restriction within the meaning of Article 19(1) (f) read with Sub-Article (5) of Article 19 of the Constitution.

The argument is put in this way. Article 19(1) (f) of the Constitution provides that all citizens shall have the right to acquire, hold and dispose of property. The exercise of such right however can be restricted under Sub-Article (5) of Article 19 provided it is a reasonable restriction in the interests of the general public. It is said therefore that the landlord's right to recover his own property can only be restricted if it is reasonable restriction in the interests of the general public. It is then contended that Section 18(5) of the Rent Act 1950 as amended preventing landlord's right to recover possession from a tenant in a pending suit where the tenant suffered statutory forfeiture of tenancy, is an unreasonable restriction coming within the infringement of Article 19(1) (f) read with Sub-Article (5) thereof.

The whole controversy therefore resolves into this question whether the law contained in Section 18(5) of the Rent Act 1950 as amended is a law imposing reasonable restriction in the interests of the general public on the exercise of the landlord's right to acquire, hold and dispose of property. The landlord must establish in order to successfully challenge the validity of the Statute under the Constitution that the exercise of his right to acquire, hold and dispose of property has been unreasonably restricted by Section 18(5) of the Rent Act, 1950. That Section prevents landlord in a pending action from obtaining possession

of his property from a tenant who incurred statutory forfeiture under the Rent Act of 1948. Does it affect the right to acquire, hold and dispose of property?

The word "acquire" in Article 19(1) (f) appears to me to mean to make one's own. "To acquire" means to obtain or get something which was never one's own before. Etymologically it comes from the Latin origin "quaerere" meaning to seek. In *James Murray's New English Dictionary (Oxford Clarendon Press) at p. 85 of Volume I* its meaning is given as to gain, or to get as one's own, to gain the ownership, and also to come into possession. To recover possession from a tenant does not appear to me, in the context of this Article to come within the meaning of the word "to acquire." It is true that tenancy itself is a species of property but the landlord does not acquire that species of property when he sues to obtain recovery of possession from the tenant. The prevention of the landlord by Section 18(5) of the Rent Act 1950 as amended from obtaining a decree in ejectment against a tenant does not in my view involve the right "to acquire" property within the meaning of this Article. Nor does this Section in my view affect the landlord's right to dispose of the property because the property though let remains disposable by the landlord. "To hold" in the same Article of the Constitution appears to me to be more relevant on the problem under consideration. The right to hold property should include the right to recover possession of the property. In one sense the landlord holds the property even when he lets it out to the tenant but that is only in the sense of holding the reversion which is also property. Holding the reversion is only a portion of the total right to hold. I am however inclined to construe the word "to hold" to mean not only to hold the reversion but also to hold the property *in presenti* and that to the exclusion of others. I am therefore of the opinion that the right to hold is affected by Section 18(5) of the Rent Act. Ordinarily when a landlord lets out his property he can subject to the terms of the contract of tenancy hold the property by determining the tenancy. But that right is restricted by Section 18(5) of the Rent Act of 1950.

Therefore the law imposing restriction on the right to hold the property must be a reasonable restriction on the exercise of

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukharji, J.*

such right in the interests of the general public under Sub-Article (5) of Article 19 of the Constitution.

Due to the operation of various causes which I need not discuss here, there is an acute shortage of housing accommodation in this State. The available supply of housing accommodation is at present totally inadequate in this State to meet the very large and pressing demand for the same. Housing accommodation is a necessity of life and some control of such accommodation in the present economic context appears to me to be in the 'interest' of everyone concerned. To the same effect is the observation of Mr. Justice Holmes of the American Supreme Court in *Julius Block* v. *Louis Hirsh* (1). In that case the emergency growing out of the first World War made the housing accommodation in the District of Columbia a problem of great public interest which was held to justify temporary regulation for its control. Holmes J. at page 871 says—"Housing is a necessary of life. All the elements of public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the Statute goes too far."

The words "general public" in Article 19(5) of the Constitution are wide enough to include sections of the public. Having regard to the large class of people who will answer the description of tenants who had suffered statutory forfeiture of their tenancy by reason of the operation of the old law of 1948, it is clear to my mind that they come within the expression "general public." That being so, the test of 'interests of the general public' as laid down in 19(5) of the Article is satisfied. It is futile and undesirable to define and limit the expression "in the interest of the general public," or the expression "reasonable." Each case should be decided on its own merits. I am, however, satisfied that it is to-day in the interest of the general public to restrict and control eviction of tenants who suffered statutory forfeiture. I see nothing unreasonable in such restriction or control. Section 18(5) of the Rent Act 1950 does no more than put reasonable restriction, reasonable in the present social and economic context, on the exercise of the landlord's right in such

(1) (1921) 256 U.S. 135; 65 Lawyer's Edition 865.

cases to hold the property. All that Section 18(5) does is to give another chance to those who suffered statutory forfeiture to stay on and expiate what after all was a specially created statutory forfeiture by payment of arrears of rent, interest and costs. I do not consider this to be unreasonable and I have come to the conclusion that it is a reasonable restriction on the exercise of landlord's right to recover possession from such tenants. I hold the law contained in Section 18(5) of the Rent Act 1950 as amended to be reasonable under Article 19 of the Constitution, and therefore valid under the Constitution on this ground also.

This disposes all the arguments on constitutional law addressed to me in this suit and I hold that section 18 of the Rent Act 1950 as amended is not unconstitutional and does not violate Articles 14 and 19 of the Constitution.

I will proceed now to consider the next issue.

Issue No. 2: This issue raises two questions for determination. One is that the order of the Rent Controller dated 22nd December 1949 in Case No. 3500A of 1949 is without jurisdiction and therefore invalid. The other is that the payments or deposits made under such invalid order are therefore insufficient to protect the defaults incurred. This argument raises the controversial problem as to how far the language of Section 18(5) attracts the operation of the proviso to Section 14 of the Rent Control Act of 1950. Another contention put forward is that even default prior to the Act of 1950 in this case are such that they come within the mischief of the proviso to Section 14 of the Act. The answer to this particular argument on pre-Act defaults given by counsel on behalf of the tenant is that there has been waiver of such pre-Act defaults by acceptance of subsequent rents. I will deal with these arguments in the same order in which they have been set out above.

The order of the Rent Controller in this case was passed when the Rent Act of 1948 was in force. Before the Rent Controller it was argued that he could not determine the standard rent in this case because the tenancy had already suffered

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukherji, J.*

statutory forfeiture by operation of section 12(3) of the Rent Act of 1948. The Rent Controller observed in his order dated 22nd December 1949, "The question whether the tenancy held by this applicant had been determined *ipso facto* or not is left open in this case." Leaving this question open, the Rent Controller proceeded to determine the standard rent in this case by reducing the rent from Rs. 91/- per month to Rs. 35/- per month with effect from October, 1949.

Section 8 of the Rent Act of 1948 required the Controller, on an application made to him by any landlord or tenant, to grant a certificate stating the standard rent under Section 2(1) (b) of that Statute which provided that where rent had not been fixed under Section 9, the standard rent was to be determined in accordance with the provisions of the schedule to the Act. Similarly, Section 9 of the Rent Act of 1948 sets out cases in which the standard rent shall be fixed by the Rent Controller, but that, again, on the application of any landlord or tenant. The definition of 'tenant' in the 1948 Act is provided by Section 2(11) stating that it means any person by whom or on whose account rent is or, but for a special contract, would be payable for any premises, and includes a legal representative, as defined by the Code of Civil Procedure, of the tenant and any person continuing in possession after the termination of the tenancy in his favour. That definition of 'tenant' under the Rent Act of 1948 was held by this Court not to include a tenant whose tenancy had been determined *ipso facto* and who was expressly mentioned as not to be deemed a tenant by Section 12(3) of that Act. Reference has already been made to the relevant authorities on the point.

The case here is that the defendant forfeited the tenancy under the statute of 1948 for non-payment of rent for the three consecutive months of Agrahayana, Paus and Magh, 1355 B.S. corresponding to the period from 17th November 1948 to 12th February 1949. Therefore at the date of 22-12-49, when the Rent Controller was purporting to decide the standard rent, it cannot be said that he had before him any application by a tenant which alone could grant him the jurisdiction to decide the standard rent.

The decision of the Division Court of the King's Bench Division in *Rex* v. *City of London &c., Rent Tribunal* (1), requires to be noticed on this branch of the argument. The learned Lord Chief Justice of England delivering judgment in that case considered the question how far a collateral point of fact may be decided by the Rent Tribunal in deciding the main issue. A Tribunal will ordinarily be held to have the power to decide a collateral fact. The reason why I think that decision does not apply in this case is two-fold. First, here the Rent Controller has not decided the fact whether the application before him was by a tenant or not, even if that question be said to be a collateral fact capable of being decided by him. Because without that finding on fact there cannot, in my opinion, be any assumption of jurisdiction by the Rent Controller. Secondly, a fact cannot be collateral which is the very basis and foundation of the jurisdiction of the Tribunal. Here the fact, whether the application was from a tenant or not, was such a primary fact and not a collateral fact. It is said then in that case the contention will always be raised before the Rent Controller in every application for fixing the rent, that there was no tenancy and thus making the office of the Rent Controller quite an ineffective and unpractical one. But that seems to me a matter for the legislature to prevent and not for this Court. If effect is to be given to this argument, then where is the limit to be drawn? Suppose, a mere trespasser makes a false claim before the Rent Controller for fixing the rent, is the Rent Controller going to decide the point whether he is a tenant or a trespasser under the cover of the doctrine of deciding a collateral issue? I think not. What is or is not collateral in such circumstances must necessarily have some reference to the terms of the Statute under which the Tribunal is required to function. The Statute under consideration in this English case is the Furnished Houses Rent Control Act 1946 (9 and 10 George VI page 34) which is very different in terms from the West Bengal Premises Rent Control Act in this respect. Section 2 of the English Act, unlike the West Bengal Act, makes elaborate provision for reference to Tribunal thereunder of contracts for furnished letting, which is given the power to call for particulars of the contract of tenancy. In this English Act

(1) [1951] 1 Times Law Rep. 41; [1951] W.N. 34.

CIVIL.

1961.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

P. B. Mukharji, J.

there is, again, nothing similar to Sections 12(3), 8 and 9 of the West Bengal Rent Act of 1948.

The principle, how far collateral issue can be decided by a statutory tribunal of limited jurisdiction, was laid down by Coleridge J. in *Bunbury* v. *Fuller* (1). It was approved by Atkin L.J. in *Rex* v. *Lincolnshire Justices* (2) and referred to by Lord Goddard, C.J. in the English case which I have just cited. Coleridge J. observed:—

> "Now it is a general rule that no court of limited jurisdiction can itself give jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limitation of this jurisdiction depends; and however this decision may be final on all particulars making up together that subject matter which, if true, is within its jurisdiction and however necessary in many cases it may be for it to make a preliminary enquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to enquiry in the superior court."

I respectfully agree with these observations of Coleridge J. as laying down the correct position in law. Two propositions appear to me to be settled on the authorities that I have examined. One is that, without deciding the collateral fact which forms the foundation of jurisdiction, the tribunal's decision on the merits must be held to be without jurisdiction and, therefore, invalid. The other is that the decision on collateral point in any event must be open to enquiry by the superior court. By applying these two propositions before me, the Rent Controller's order of the 22nd December 1949, in this case, must be held to be void as being without jurisdiction.

The next problem for consideration is the plaintiff's argument that the defaults in this case preclude the tenant from obtaining relief under Section 18(5) of the Rent Act of 1950

(1) (1853) 9 Ex. Rep. 111 (140).

(2) [1916] 2 K.B. 192 (201).

as amended. It is to be decided first on the basis of the alleged post-Act defaults and, secondly, on the basis of alleged pre-Act defaults.

The facts on this point will appear from Ex. 'D' which is the chart showing payments or deposits with dates and amounts. The pre-Act defaults will appear from this chart and the contention in their regard is that rents were not paid in time, although they were accepted by the plaintiff. Pre-Act defaults are said to arise on the ground of irregularity in the payments and not in the actual failure to make the payment at all. The Post-Act defaults as shown in the chart are, however, said to arise from Falgoon 1356 B.S. (Falgoon 1356 B.S. croresponds to a period from 13-2-50 to 14-3-50). It is from the month of Falgoon that the rent is paid at the rate of Rs. 43/- per month as fixed by the order of the Rent Controller which I have found to be invalid. Payment of deposit of rent at this rate of Rs. 43/- per month, therefore, from Falgoon 1356 B.S. up to date is said not to have the default. This is so far as the post-Act defaults are concerned.

This argument postulates the application of the proviso to Section 14 in granting relief under Section 18(5) as amended. The language of amended Section 18(5) uses the expression "the Court shall exercise the power of granting relief against ejectment given by section 14 of this Act following the provisions and procedure of that section as far as may be necessary." Among the 'provisions' to be followed is the proviso to Section 14. This basic postulate has been challenged.

The next consideration is—assuming that the proviso to Section 14 applies under amended Section 18(5), do the defaults in this case come within the proviso? What is this proviso? It can only apply if it is found that the tenant makes default in payment of the rents referred to in clause (i) of the proviso to Section 12(1) of the Rent Act of 1950 on three occasions within a period of 18 months. On behalf of the defendant tenant, it is argued that such a default has not occurred in this case.

I will proceed now to an examination of these two arguments.

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukherji, J.*

In my view, the basic postulate in the first argument is sound. I will indicate the reasons which lead me to this conclusion after setting out the argument a little more elaborately on this point. In granting relief under Section 18(5), it is argued that the Court only exercises the powers of relief against ejectment given by Section 14 of the Act following the provisions and procedure of that Section as far as may be necessary. Therefore it is said that the proviso to Section 14 need not be applied, but only that part of Section 14 without the proviso.

The proviso to Section 14 of the Act is certainly applicable to cases that come under Section 14. The words "as far as may be necessary" in Section 18(5) are supposed to exclude the proviso when Section 14 is applied for the purpose of giving relief under Section 18(5). The argument again emphasises the words "powers of granting relief against ejectment." Therefore, it is said that as the proviso does not relate to the power of granting relief but only creates the ground of excluding relief, it should not be applied.

To my mind this argument suffers from a fallacy. A proviso to a section is just as much a part of the section as any other part. The fact that particular provision is stated by way of proviso to a section does not, in my judgment, in any way derogate from the law which has always to be read from the section as a whole including any proviso. The law in my view is clearly laid down on the point in *Maxwell's Interpretation of Statutes 9th Edition, page* 165 where the correct view is expressed in the following statements:—

> "There is no rule that the first or enacting part is to be construed without reference to the proviso. The proper course is to apply the broad general rule of construction which is that a section or enactment is to be construed as a whole each portion throwing light if need be on the rest. The true principle undoubtedly is that the sound interpretation and meaning of a Statute on a view of the enacting clause, saving clause and proviso, taken and construed together is to prevail."

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

P. B. Mukharji, J.

Now what is the power under Section 14 of granting the relief? That power is not only stated in sub-sections 1, 2 & 3 of Section 14, but it must be held to be a power which is not exercisable when a tenant makes default in payment of rent referred to in clause (i) of the proviso to sub-section 1 of section 12 on three occasions within a period of 18 months. The power, therefore, of granting relief under Section 14 is a circumscribed power, not an unqualified power. It will, in my opinion, be spelling out a new power of relief if the Section is read without the proviso. The proviso goes as much to the consideration of the power to grant relief because when the conditions stated in the proviso exist the power to grant relief against ejectment does not exist. I am not impressed by the argument attempted to be made at one stage that in granting relief under Section 18(5), Section 14 is not applied by its own force but indirectly by reason of the language of Section 18(5). I am of the view whether a section applies directly or indirectly, the whole of that Section is to be applied without reservation to the particular case where it is intended to be applied. The power of granting relief under Section 14 cannot be divorced from the proviso because the proviso is the very basic foundation on which the existence of the power to grant relief depends. It is not an unqualified power of granting relief under Section 14. Limitation on the power is part of the power itself and forms its integral content. This, I find, is consistent with the settled principles of construction of statutes including construction of provisos in such statutes. The proviso is only a manner of expression but cannot alter the substance of the law which has always to be gathered from the Section as a whole including the proviso.

I will at this stage dispose of another argument on this branch. It is said that the application of proviso to Section 14 in granting relief under Section 18(5) would make a difference between pending suits and cases where decrees have already been made on the ground of *ipso facto* determination; for the latter case, relief is granted under sub-section 2, 3 and 4 of Section 18 which do not contain anything like the proviso to Section 14. But in former case a difference is made by applying the proviso to Section 14. The basic assumption on which this argument proceeds is, in my view, unsound because decrees already passed

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

P. B. Mukherji, J.

and suits pending may be justifiably differentiated. From this point of view, I do not subscribe to the opinion expressed that Section 18(5) of the Rent Act of 1950 is intended to achieve identically the same results both in cases where decrees have already been made as well as in pending suits on ground of statutory forfeiture. I should have thought that if it was intended that pending suits as well as decrees on the ground of statutory forfeiture should be treated similarly on equal footing, then the legislature would have easily said that under Section 18(5) the Court shall exercise similar powers hereinbefore mentioned in sub-sections 2, 3 and 4 of Section 18 without any reference to Section 14 at all. On the other hand, the more cogent consideration to my mind is that the legislature put pending suits on the ground of *ipso facto* determination on the same footing as suits filed after coming into operation of the Rent Act of 1950. That seems to me the more sensible conclusion. From that point of view, application of the proviso to Section 14 in pending suits under Section 18(5) would be justified.

But that is not the end of this difficulty. While I feel fortified both by the principles of construction as well as by the language of Section 18(5) of the Rent Act, 1950 that the proviso to Section 14 should be applicable in suits pending under Section 18(5), I feel this is one of those cases where I have to disregard both the language of the section 18(5) as well as settled rules of construction for another much greater and over-riding consideration. That consideration is that application of proviso to Section 14 in granting relief under Section 18(5) would make the provisions in Sections 18(5) a complete dead letter and utterly nugatory. One of the cardinal rules of construction of Statutes is that no Statute or any part thereof however oracular should be treated as void and meaningless. If any authority is needed for this well-settled proposition that is to be found in *Craies on Statutes, 4th Edition, pp.* 69 *and* 92. I will now explain how the application of the proviso to Section 14 in granting relief under Section 18(5) will make the latter Section meaningless and unworkable.

In all cases of statutory forfeiture under the Rent Act of 1948, the tenant after such forfeiture could neither pay nor deposit rent because he was not deemed to be a tenant at all

either contractual or statutory. Therefore, in all pending suits under 18(5) on ground of statutory forfeiture, when amendment was made on the 30th November 1950, default within the meaning of proviso to section 14 had already occurred. The result, therefore, in such a case of applying the proviso to Section 14 under section 18(5) will be to make the amended Section 18(5) completely ineffective and meaningless. The Rent Act of 1950 came into force on 30-3-50. Suits pending on that date on the ground of statutory forfeiture must show on that date that the rent had been in arrears at any rate for January, February and March 1950, if not earlier. Now if one comes to the date of 30-11-50 when the amendment was made, then the tenant had already made default in payment of rent referred to in clause (i) of the proviso to 12(1) on three occasions within a period of 18 months as contemplated by the proviso to Section 14 of the Rent Act of 1950. It is quite true that on 30-11-50 such tenants are deemed again to be tenants from 30-3-50, but that is of no help to the sufferers because now after the amendment, this is already too late. This nonsensical result is due to the fact that formerly tenants who were granted relief under the unamended Section 18(5) could pay or deposit rent under the Rent Act of 1948 because such tenants were not those who incurred the statutory forfeiture and therefore, application of proviso to Section 14 was quite practical and sensible. I have no doubt left in my mind that here again the Legislature committed the blunder by forgetting to make consequential amendments in Section 18(5) which seemed to follow naturally as a result of the amendment by the substitution of tenants under statutory forfeiture for the ordinary short-term defaulter.

What then is to be done in such a situation? Denning, L.J. in *Seaford Court Estate* v. *Asher* (1), observes:

> "Where a defect appears in a Statute, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the Statute but also from a consideration of the social conditions which give rise to it, and of the

(1) [1949] 2 All. E.R. 155.

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukharji, J.*

mischief which it was passed to remedy and then he must supplement the written word so as to give force and life to the intention of the Legislature."

This is the desperate position of the Court in the extreme case. Such an extreme case is the present one with which I am faced. The burden thrown on the Court to give force and life to dead words may be quite unnecessary and may misguide the Court in its attempt to discharge the burden into the path of what has been euphemistically called legislative judgments. It makes ancient controversy between judicial decision and legislative action acquire new proportion and new significance.

With a view to give working effect to Section 18(5) of the Rent Act as amended I propose to adopt therefore the following construction which to my mind is the only possible construction and which reconciles the different conflicts on the point. The proviso to Section 14, although attracted by the language of Section 18(5), should not be applied while granting relief under Section 18(5) because such an application of the proviso of section 14 will make Section 18(5) completely unworkable and meaningless. My reasons for this conclusion may be briefly stated.

The proviso to Section 14 in order to operate must bring the tenant within the meaning of clause (i) of Section 12(1) and the default mentioned in clause (i) of Section 12(1) must be on three occasions within a period of 18 months. Now, under clause (i) of Section 12(1) two months rent legally payable by the tenant and due from him must be in arrears. I will, therefore, hold that in this case only three months rent legally payable was in arrears at the date of the institution of the suit. Thereafter no rent became 'legally payable' by the tenant because of the statutory forfeiture that he had incurred thereafter. Retrospective condonation of such statutory forfeiture which occurred on the 30-11-50 by the amendment making him a tenant again from 30-3-50 could not enable him to pay in the meantime and cannot therefore permit the defaults from March to November to be brought into calculation so as to make him come within the default under clause (i) of Section 12(1) on three occasions within a period of 18 months. Any other construction

will in my opinion make the entire law in amended section 18(5) quite insensible.

It only remains for me to notice some of the decisions in this regard if only to show that the law on this point is made obscure by clumsy draftsmanship and if only to show that the construction of the Rent Act of 1950 has become very nearly a cross-word puzzle. As many as six learned Judges of this Court have expressed differently on this point. I do not propose to notice all these differences which are not necessary for me but I will notice two or three decisions that are reported. In *S. K. Chaudhury* v. *Joy Kumar Sarkar* (1), Roxburgh J. came to the conclusion that the proviso to section 14 of the Act did not include the pre-Act defaults and at page 80 of the report the learned Judge set forth his reasons in the following terms:—

> "It is to be noted that under Section 18(5) of the Act, the Court has to exercise the powers of granting relief against ejectment given by Section 14 of the Act following the provisions and procedure of that Section as far as may be necessary. It does not provide that the relief is to be given against the same default as that against which Section 14 is to give relief, namely, the default created by the effect of the proviso (i) to Section 12(1) of the Act. The default against which relief is to be given following the provisions and procedure of Section 14 is the default under 1948 Act which would result in the decree for ejectment under that Act."

Although it has been contended before me that I should not accept this view and for that purpose other decisions of this Court have been shown to me, on a close consideration of the whole Act and the different interpretations put thereupon, I find myself in complete agreement with the above reason of Roxburgh J.

Bose J. in *Amar Nath Misra* v. *Sreenarayan Mansingka* (2) takes a different view and comes to the conclusion that the Court's power of granting reliefs under Section 18(5) of Rent Act

(1) (1950) 55 C.W.N. 75.
(2) (1950) 54 C.W.N. 617.

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukharji, J.*

1950 is limited by the proviso to Section 14 and holds that Section 18(5) makes the entire Section 14 including its proviso applicable to pending suits. No particular reasons are however stated in that judgment. There was an appeal from that judgment reported as *Sreenarain Mansingka* v. *Amarnath Mishra* (1). But there at page 21 S. N. Banerjee J. delivering judgment observed, "It is not argued by the appellant's Counsel that there has been no breach as contemplated in that proviso referred to in Section 14 but what is sought to be argued is that even so, the tenant is entitled to relief contemplated in Section 18(5) by reason of the fact that the tenant was a statutory tenant under the Act of 1948 and therefore, he must get also all the benefits of the Act of 1948." Now both the decisions of Bose J. and of the Appeal Court were rendered on the original Section 18(5) and not on its amendment which now raises special difficulties on the way of applying the proviso to Section 14 under Section 18(5) as amended. Again as will be clear from the observations of Banerjee J. it was never mooted before the Court of Appeal that there was no breach as contemplated in that proviso, but here before me that was the very argument made. I agree with Bose J. as a matter of academic construction that Section 18(5) should attract the proviso to section 14 But the matter does not end there. The more practical problem begins thereafter. Can the proviso of Section 14 phrased as it is ever be made to apply to the default which has led to the statutory forfeiture under Section 12(3) of the Rent Act of 1948? The answer depends on the construction of the proviso itself. It must be construed strictly as it is intended to exclude relief in an otherwise remedial Section and a remedial Statute.

My construction is that the proviso on a proper interpretation means that the default must be such as is referred to in clause (i) of Section 12(1) of the Rent Act of 1950. Such a default can never occur in the case of statutory forfeiture of the interest of the tenant under Section 12(3) of the Rent Act of 1948, because there on the default of payment or deposit of only three consecutive months' rent the tenant's interest was *ipso facto* determined by Statute with the result there never can be rent "legally payable" in default on three occasions each with a

(1) (1950) 87 C.L.J. 4.

period of two months such as is contemplated under proviso (i) of Section 12(1) read with Section 14 of the Rent Act of 1950.

The compelling consideration for me in coming to this conclusion is that otherwise amended Section 18(5) will be entirely nugatory and quite unworkable. Impossibility of working out a Statute or the test of giving working effect to the Statute must override any other consideration. I am not prepared to put an interpretation which will make the section a dead letter. My conclusion, therefore, is this that a proper interpretation of amended Section 18(5) of the Rent Act, 1950 does attract the proviso to Section 14 of that Act, but that proviso to Section 14 must be strictly construed and must be confined only to the default contemplated in clause (i) of Section 12(1) of the Rent Act, 1950 and not defaults which are inevitable as a result of statutory forfeiture under the Rent Act of 1948 by which such tenants could neither pay nor deposit rent during the period from the 30th March 1950 to the 30th November 1950.

In view of construction of the proviso to Section 14 that I have adopted it is unnecessary for me to deal with pre-Act defaults separately. Because in the case of statutory forfeiture under Section 12(3) of the Rent Act, defaults whether pre-Act or post-Act can never come within the default of the particular description mentioned in the telescopic provisions of proviso (1) of Section 12(1) and Section 14 of the Rent Act 1950. Besides Ex. D. the chart shows that there was in any event in fact no two monthly default on three different occasions in a period of 18 months.

The result therefore is that the plaintiff at this stage is not entitled to any judgment for possession. The course of the Court is to follow the provisions and procedure of Section 14 as far as may be necessary. I follow Sub-sections (1), (2) and (3) of Section 14 of the Rent Act of 1950 and make an order accordingly.

I determine that the rent legally payable by the defendant is Rs. 2,520-11-2 up to the 5th day of May 1951, being the 15th day from this order and calculated from the 1st Magh 1355 B.S. corresponding to the 14th January 1949 being a total period of

CIVIL.

1951.

S. B. Trading Co., Ltd. v. Shyamlal Ramchandra.

*P. B. Mukharji, J.*

27 months and 21 days. This is on the basis of the agreed rent under the contract of tenancy at the rate of Rs. 91/- per month and subject to any determination of standard rent under the Rent Act 1950. If the standard rent so determined is less than the agreed rent then the excess will be refundable by the plaintiff to the defendant.

I determine also the amount of interest on such arrears of rent at the rate of 9⅜% per annum which the parties agree at Rs. 250/- altogether.

I determine the costs fairly allowable to the plaintiff to be Rs. 3,000/- on the consent of the parties.

The consent of the parties is only with regard to the amount of interest and costs and will not prejudice right of appeal of any party if so advised.

The defendant will therefore pay the aggregate sum of Rs. 5,770-11-2 being the said total of arrears of rent, interest and costs on the 15th day from this order excluding the day of the order which will be the 5th day of May, 1951.

If the defendant deposits in Court the sum specified in this order within the time fixed aforesaid the suit so far as claim for possession is concerned shall be dismissed. In default of such payment the Court will proceed with the hearing of the suit.

The defendant is also liable to pay to the Plaintiff electric charges for the said period of 27 months and 21 days at the agreed rate of Rs. 8/- per month amounting altogether to Rs. 222/-.

Liberty to the parties to mention.

*Messrs. N. C. Bural & Pyne*: Solicitors for the Plaintiff.

*Mr. B. C. Chakravarty*: Solicitor for the Defendant.

*Plaintiff not entitled to possession at this stage.*

R.M.

## SUPREME COURT.

Present: *The Hon'ble Mr. Justice Mehr Chand Mahajan and the Hon'ble Mr. Justice Vivian Bose.*

HARLA

*v.*

THE STATE OF RAJASTHAN*

CRIMINAL

1951.

*September, 24.*

*Resolution, mere passing of—Without promulgation or publication—Not sufficient to make it law in the absence of specific law or custom to the contrary.*

*Jaipur Laws Act of 1923, Section 3(b)—If saves Resolutions which never acquired the force of law.*

In the absence of some specific law or custom to the contrary, the mere passing of a Resolution by a Council of Ministers in a State without promulgation or publication in the Gazette or other means to make the Act known to the public is not sufficient to make it law. Natural justice requires that before a law can become operative it must be promulgated or published.

Section 3(B) of the Jaipur Laws Act of 1923 may save all regulations then in force from the necessity of publication in the Gazette. But that does not mean that the Act will also save resolutions which never acquired the force of law.

Appeal by the Accused who was convicted under section 7 of the Jaipur Opium Act, and find Rs. 50/-.

The material facts will appear from the judgment.

*Shri H. J. Umrigar* instructed by *Shri R. A. Govind,* Agent for the Appellant.

*Shri G. C. Mathur* instructed by *Shri P. A. Mehta,* Agent for the Respondent.

* Criminal Appeal No. 5 of 1951 against the judgment and order dated the 18th August 1950 of the High Court of Judicature for Rajasthan at Jaipur (*Nawalkishore, C.J.* and *Dave, J.*) in Criminal Reference No. 219 of Sambat 2005.

CRIMINAL.

1951.

Harla
v.
The State of Rajasthan.

*September, 24.*

The judgment of the Court was delivered by:—

**V. Bose, J.:**—The appellant was convicted under section 7 of the Jaipur Opium Act and fined Rs. 50. The case as such is trivial but the High Court of Rajasthan in Jaipur granted special leave to appeal as a important point touching the *vires* of the Act arises. We will state the facts chronologically.

It is conceded that the Rules of Jaipur had full powers of government including those of legislation. On the 7th of September 1922 the late Maharaja died and at the time of his death his successor, the present Maharaja, was a minor. Accordingly, the Crown representative appointed a Council of Ministers to look after the government and administration of the State during the Maharaja's minority.

On the 11th of December 1923 this Council passed a Resolution which purported to enact the Jaipur Opium Act, and the only question is whether the mere passing of the Resolution without promulgation or publication in the Gazette, or other means to make the Act known to the public, was sufficient to make it law. We are of opinion that it was not. But before giving our reasons for so holding, we will refer to some further facts.

About the same time (that is to say, in the year 1923—we have not been given the exact date) the same Council enacted the Jaipur Laws Act, 1923. Section 3(b) of this Act provided as follows:—

> "3. Subject to the prerogative of the Ruler the law to be administered by the Court of Jaipur State shall be as follows.
>
> * * *
>
> "(b) All the regulations now in force within the said territories, and the enactments and regulations that may hereafter be passed from time to time by the State and published in the Official Gazette."

This law came into force on the 1st of November 1924.

It is admitted that the Jaipur Opium Act was never published in the Gazette either before or after the 1st of November 1924. But it is contended that that was not necessary because it was a "regulation" already in force on that date.

The only other fact of consequence is that on the 19th of May 1938 section 1 of the Jaipur Opium Act was amended by the addition of sub-section (c) which ran as follows:

"(c) It shall come into force from the 1st of September 1924."

The offence for which the appellant was convicted took place on the 8th of October 1948.

Dealing first with the last of these Acts, namely the one of the 19th of May 1928, we can put that on one side at once because, unless the Opium Act was valid when made, the mere addition of a clause fourteen years later stating that it shall come into force at a date fourteen years earlier would be useless. In the year 1938 there was a law which required all enactments after the 1st of November 1924 to be published in the Gazette. Therefore, if the Opium Act was not a valid Act on that date, it could not be validated by the publication of only one section of it in the Gazette fourteen years later. The Jaipur Laws Act of 1923 required the whole of the enactment to be published, therefore publication of only one section would not validate it if it was not already valid. We need not consider whether a law could be made retroactive so as to take effect from 1924 by publication in 1938, though that point was argued. That throws us back to the position in 1923 and raises the question whether a law could be brought into operation by a mere resolution of the Jaipur Council.

We do not know what laws were operative in Jaipur regarding the coming into force of an enactment in that State. We were not shown any, nor was our attention drawn to any custom which could be said to govern the matter. In the absence of any special law or custom, we are of opinion that it would be

CRIMINAL.

1951.

Harla
v.
The State of Rajasthan.

*Vivian Bose, J.*

against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential.

In England the rule is that Acts of Parliament become law from the first moment of the day on which they receive the Royal assent, but Royal Proclamations only when actually published in the official Gazette. See *footnote (a) to paragraph 776 page 601 of Halsbury's Laws of England (Hailsham edition) Volume VI and 32 Halsbury's Laws of England (Hailsham edition) page 150 note (r)*. But even there it was necessary to enact a special Act of Parliament to enable such proclamations to become law by publication in the Gazette though a Royal Proclamation is the highest kind of law, other than an Act of Parliament, known to the British Constitution; and even the publication in the London Gazette will not make the proclamation valid in Scotland nor will publication in the Edinburgh Gazette make it valid for England. It is clear therefore that the mere enacting or signing of a Royal Proclamation is not enough. There must be publication before it can become law, and in England the nature of the publication has to be prescribed by an Act of Parliament.

The Act of Parliament regulating this matter is the Crown

Office Act of 1877 (40 and 41 Victoria Ch. 41). That Act, in addition to making provision for publication in certain official Gazettes, also provides for the making of rules by Order in Council for the best means of making Proclamations known to the public. The British Parliament has therefore insisted in the Crown Office Act that not only must there be publication in the Gazette but in addition there must be other modes of publication, if an Order in Council so directs, so that the people at large may know what these special laws are. The Crown Office Act directs His Majesty in Council carefully to consider the best mode of making these laws known to the public and empowers that body to draw up rules for the same and embody them in an Order in Council. We take it that if these Proclamations are not published strictly in accordance with the rules so drawn up, they will not be valid law.

The principle underlying this question has been judicially considered in England. For example, on a somewhat lower plane, it was held in *Johnson* v. *Sargant* (1) that an Order of the Food Controller under the Beans, Peas and Pulse (Requisition) Order, 1917 does not become operative until it is made known to the public, and the difference between an Order of that kind and an Act of the British Parliament is stressed. The difference is obvious. Acts of the British Parliament are publicly enacted. The debates are open to the public and the Acts are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done. They also receive wide publicity in papers and, now, over the wireless. Not so Royal Proclamations and Orders of a Food Controller and so forth. There must therefore be promulgation and publication in their cases. The mode of publication can vary; what is a good method in one country may not necessarily be the best in another. But reasonable publication of some sort there must be.

Nor is the principle peculiar to England. It was applied to France by the Code Napoleon, the first Article of which states that the laws are executory "by virtue of the promulgation thereof" and that they shall come into effect "from the

(1) [1918] 1 K.B. 101; 67 L.J. K.B. 122.

CRIMINAL.

1951.

Harbh
v.
The State of Rajasthan.

*Vivian Bose, J.*

moment at which their promulgation can have been known." So also it has been applied in India in, for instance, matters arising under Rule 119 of the Defence of India Rules. See for example, *Crown* v. *Manghumal Tekumal* (1), *Shakoor* v. *King-Emperor* (2) and *Babulal* v. *King-Emperor* (3). It is true none of these cases is analogous to the one before us but they are only particular applications of a deeper rule which is founded on natural justice.

The Council of Ministers which passed the Jaipur Opium Act was not a sovereign body nor did it function of its own right. It was brought into being by the Crown Representative, and the Jaipur Gazette Notification dated the 11th August 1923 defined and limited its powers. We are entitled therefore to import into this matter consideration of the principles and notions of natural justice which underlie the British Constitution, for it is inconceivable that a representative of His Britannic Majesty could have contemplated the creation of a body which could wield powers so adhorrent to the fundamental principles of natural justice which all freedom loving peoples share. We hold that, in the absence of some specific law or custom to the contrary, a mere resolution of a Council of Ministers in the Jaipur State without further publication or promulgation would not be sufficient to make a law operative.

It is necessary to consider another point. It was urged that section 3(b) of the Jaipur Laws Act of 1923 saved all regulations then in force from the necessity of publication in the Gazette. That may be so, but the Act only saved laws which were valid at the time and not resolutions which had never acquired the force of law.

The appeal succeeds. The conviction and sentence are set aside. The fine, if paid, will be refunded.

*Appeal allowed: Conviction and sentence set aside.*

R.M.

(1) [1944] I.L.R. Karachi 107.
(2) [1944] I.L.R. Nag. 150.
(3) [1945] I.L.R. Nag. 761.

## ORIGINAL CIVIL.

*Before Mr. Justice S. N. Banerjee.*

GONESHMULL SURANA

*v.*

NAGRAJ SURANA

CIVIL.

1951.

*November, 20.*

*Abatement of suit—Suit filed by karta of a Hindu joint family—Whether the suit abates on the death of the karta—Hindu system of property discussed—Function and position of the karta of a Hindu Joint family.*

The karta of a Hindu Joint family has neither any share in the income nor in the property. It is the family, the corporate body, which is the owner of the property, and if one member dies, it is still the family that remains the owner In a suit to recover a joint family property, the karta in suing as such conducts the suit on behalf of the family. His name is used for the family. And it is a compendious way of describing the family. The death of karta does not make any difference to the suit at all. The family is there and the next karta springs up and the family is described as suing by so and so the next karta

*Held* accordingly that a suit does not abate on the death of the karta.

Application for setting aside abatement of the suit.

Suit to recover joint family property.

The material facts will appear from the judgment.

*Messrs. H. N. Sanyal and D. C. Sethia* for the Petitioner

*Messrs. A. K. Sen and A. C. Bhabra* for the Respondent.

The judgment of the Court was as follows:—

**S. N. Banerjee, J.:**—This is an application for setting aside the abatement (if any) of the suit and substitution of the peti-

* Application for setting aside abatement in re; Suit No. 1131 of 1947.

CIVIL.

1951.

Goneshmull Surana
v.
Nagraj Surana

*Banerjee, J.*

tioner in place of the deceased Ganeshmull Surana who filed the suit for self and as the Karta of a Mitakshara joint family carrying on a joint family business in the name and style of Messrs. Ganeshmull Nimchand, against defendant Nagraj Surana (inter alia) the following allegations:—Ganeshmull Surana at all material times was the Karta of the joint family and for the benefit of the family carried on a joint family business which acted as a commission agent of the defendant: that there were various transactions between the parties, and a sum of Rs. 10,887/7/- including interest became due which the defendant inspite of demand did not pay.

The suit was filed in 1947. Ganeshmull died on 23rd December, 1949 and the Notice of Motion of this application was taken out on 1st May, 1950.

From the dates it is clear that the application is out of time Mr. H. N. Sanyal who appears on behalf of the petitioner has conceded that the petition does not disclose sufficient grounds for enlargement of the time. But he has raised an interesting question. He contends that the suit has not abated and a suit of this nature cannot abate by the death of a Karta. I think Mr. Sanyal's contention is right.

As the point is an important one, and as I am differing from certain decisions of other Courts, I must give my reasons. No authority of this court has been brought to my notice which directly covers the point.

The question is—Has there been an abatement of the suit. The answer depends on the nature of property in Hindu law In the plaint the allegation being that the joint family firm acted as the Commission agent the right to recover the money is in the joint family.

The Hindu system of property has a peculiar characteristic. It has no reference to any notion that can be drawn from the English Law. In England ownership, as a rule, is single. independent and unrestricted. That is not so, as a general rule, in India. Individual property is the rule in the West; corporate property is the rule in the East.

Three forms of the corporate system of property exist in India. The patriarchal family, the joint family and the village community. The two former in one shape or other exist throughout the length and breadth of India. The village community exists only in certain parts of India, particularly in the Punjab.

The partiarchal family may be defined as 'a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grandfather, great grandfather.' The patriarch has absolute authority over the family. Whatever property is acquired by any member of that family belongs to the patriarch.

The joint family arises, where it does arise, at the death of the common ancestor. After the death of the common ancester, if the family choose to continue united, there is a joint family. The eldest son as a rule is the natural head. But his position is not like that of the deceased patriarch; the one was head of the family by a natural authority; the other can only be so by a delegated authority. He is head by choice, or by natural selection, and not by right. The eldest of course is usually the head. But it is not necessary that he should be the head. A junior member who is more capable and better suited for the post may be the head. The head of a joint family is known as the 'Karta' or its managing member.

The joint family may not have any property. But if it has, it belongs to the family which is a corporate body of which the members are individuals. The ownership of the co-parcenery property is in the whole body of the co-parceners. According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. Each member with his wife and children is entitled to be maintained and educated out of the family property. But no member can say that because some other member has got a bigger family, he is entitled to a better mode of living commensurate with his share in the income as on partition. If he is dissatisfied, his remedy is to ask for partition. But until then, perfect equality exists

CIVIL.

1951.

Goneshmull Surana v. Nagraj Surana

*Banerjee, J.*

among the members of the family, namely, in their right to be maintained, to be educated, etc. out of the joint family property. But no member has any share in the property or in the income thereof.

Death does not dissolve the family nor make any difference in its corporate character. At any particular point of time, if the question is asked: 'Who is the owner of the property,' the answer would be 'the joint family.' Who are its members? "A, B, C." If ten years later the same questions are asked, the first question will evoke the same answer if, in the meantime, there has been no partition; the answer to the second question may be C, D, E, A and B having died in the meantime, and D and E born into the family. Those who are born in the family are entitled to be maintained and educated in the same way as the other members. But they got no specific share in the property. On the death of a particular member, nothing devolves on his sons as his heirs, because the member had no share or estate in the joint family property. His sons are interested in the joint family property not because they are sons of the deceased coparcener, but because they are members of the coparcenery. This is the fundamental characteristic of a Hindu joint family. Recent legislation, I do not think, has made any change in this respect.

It is obvious that the business of the family cannot be carried on by all the members; some of them may be babies. Yet the business has to be carried on. It is carried on by the Karta for the time being. He is not an agent of the other members of the family though to a certain extent he is liable to render accounts. At time of compelling necessity he can dispose of the entire joint family property. This is not because he has got any proprietary right in the joint family property, but because he represents the family and can sell the property for the necessity of the family.

It follows, as a result of the necessity for either joint action or action by the accredited representative of the family, that a single coparcener who is not the managing member cannot sue or be sued on behalf of the family. A single member cannot sue, or proceed by way of execution to recover a particular

portion of the family property for himself, whether his claim is preferred against a stranger who is asserted to be wrongfully in possession, or against his coparceners. If the suit is against a stranger the suit must be by all the members and must be brought to recover the whole property for the benefit of the family.

A necessary consequence of the corporate character of the family holding is that, wherever any transaction affects that property, all the members must be expressly or impliedly represented by the managing member or must be parties to it; and whatever is done must be done for the benefit of all and not of any single individual. It is well settled that the managing member of a family business, or the managing members where there are more than one have the power of making contracts, giving receipts and compromising or discharging claims incidental to the business. They can sue and be sued in all matters affecting that business, without joining the other members of the family and in particular in respect of contracts and transactions made in their own names. In other words, the managing member has the right to represent the entire family in all transactions relating to the family, whether they are in connection with immoveable properties or otherwise. The managing member represents the family in a suit whether the suit is on a mortgage or is for the recovery of money. (*Mayne 10th Edn. Chaps. 7 and 8*). This is the principle, I apprehend, which underlies the decision of their Lordships of the Privy Council in *Lingangowda* v. *Basangowda* (1), where it was held that a decree obtained by or against the managing member of a joint Hindu family is binding upon minor members of the family under section 11, explanation 6, of the Code of Civil Procedure, (1908), if it appears to the Court that the Manager was acting in the former litigation on behalf of the minors in their interests.

Lord Phillimore delivering the judgment of the Board made the following observation (P. 125):—

> "In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to liti-

(1) (1927) L.R. 54 I.A. 122.

CIVIL.

1951.

Goneshmull Surana v. Nagraj Surana

*Banerjee, J.*

gate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to the explanation 6 of section 11 of the Code of Civil Procedure, (1908) to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors."

The relevant portion of section 11 explanation 6, is this:—

"Whether persons litigate bonafide in respect of .... a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating."

The decision in my view depends upon a very broad principle and that principle I apprehend is this: that if a person has by law the right to represent a group of persons and files a suit for the benefit of all to enforce a right belonging to them collectively, then whatever is decided in the suit is binding on all the persons concerned: all those persons are regarded as being parties to the suit.

In *Krishnaswami Iyer* v. *Seethalakshmi Ammal,* (1), in a suit by the nearest reversioner to set aside a widow's alienation, the plaintiff died and the Court declared an abatement of the suit *suo motu* without hearing the next revisioner. It was held that the latter could apply to the Court to continue the suit for himself and the other surviving reversioners and the Court could under o. 1, r. 8 (2) bring him on the record in place of the deceased plaintiff. It was further held that the right to apply to continue the suit was incidental to a reversionary suit, wherein the plaintiff represented the entire body of reversioners and such a suit should be decided, if possible, in one litigation. An application to set aside the order of abatement would be misconceiving the action but it may be treated as an application to continue the suit.

(1) [1919] A.I.R. Mad. 479.

Sadasiva Aiyar, J. said at P. 480:—

> "In the beginning of 1915 the Privy Council decided the case reported as *Venkatanarayana Pillai* v. *Subbammal* (1), in which their Lordships held that a suit brought by the next reversioner is a suit really brought on behalf of the entire body of the reversioners and that if the reversioner who was conducting the suit dies, the next man is entitled to come in for the purpose of continuing the conduct of the suit. Their Lordships express a doubt on the question whether the next reversioner, who has the right to continue the suit, comes within the definition of a 'legal representative' in section 2, sub-section 11 of the Code of Civil Procedure. But they base their decision on a broader ground, namely, that he was already a party to the suit though the conduct of it was in the hands of the first reversioner and that therefore he was entitled to continue the suit after the plaintiff's death."

Just as a reversioner represents the other reversioners, so a Karta represents the joint family in the suit. The Hindu Law permits the conduct of the family's suit to be placed in the hands of the Karta, but the family is the party to the suit.

In *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (2), a decree for money passed against a member of a joint Hindu family governed by the Mitakshara was sought to be executed after his death, against his son and heir. Mitra J. one of the members of the Full Bench, made the following observation at P. 654:—

> "Both, therefore, on the principle that the son is an heir as regards self-acquired property and that he is the person to whom the *universitas juris* of the deceased passes according to Hindu Law, he being the representative of the family and the custodian of the family property in succession to the deceased according to the Mitakshara system which retains the relics of the patriachal system, I am of opinion

(1) (1915) L.R. 42 I.A. 125.

(2) (1907) I.L.R. 34 Calc. 642 F.B.

CIVIL.

1951.

Goneshmull Surana v. Nagraj Surana

*Banerjee, J.*

that the son may, on the death of the father, be placed on the record of a suit as his legal representative after decree, irrespective of the nature of the property sought to be attached by the decree-holder."

In *Ganesh* v. *Narayan* (1), it was held that a decree for injunction obtained against the father as the Manager and representative of a joint family estate can, on his death, be executed against his son as his legal representative under section 50 read with section 53 of the Civil Procedure Code. This decision was approved by the Privy Council in *Brimsingh* v. *Shersingh* (2), Patkar J. in the Bombay case said at P. 716:—

> "In one sense a co-parcener leaves no estate in the coparcenery property on his death, and so a surviving coparcener, even though a son, is not strictly his legal representative, and it cannot be said that the estate of the judgment debtor has devolved on the death of the judgment-debtor on his joint son who is sought to be proceeded against in execution. If the father represented the estate of the joint family during his life time, it is difficult to hold that the son though joint with him cannot represent the estate of the joint family which was represented by his deceased father, and is not a person who in law represents the estate of a deceased person. Under section 53 property in the hands of the sons, which is liable under Hindu Law for the payment of the debt of a deceased ancester in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son as his legal representative."

In this case his Lordship further observed that it was difficult to accept the view taken in *Chunilal* v. *Bai Mani* (3), that under section 50 of the Civil Procedure Code a son who is joint is not a legal representative of his father.

The words "shall be deemed to be property of the deceased" in Section 53 are very significant. It suggests that the deceased

(1) (1931) I.L.R. 55 Bom. 709
(2) (1947) 52 C.W.N. 109.
(3) (1918) I.L.R. 42 Bom. 504.

has left no property; but in respect of debts of the father which are not tainted with immorality the entire property of the joint family consisting of the father and the sons is liable. When a father incurs a debt it is the pious obligation of a son governed by the Hindu Law to pay the debt. On that ground when the father is dead though he does not leave any estate because he had none in his lifetime, property in the hands of the son becomes liable to be attached and sold to satisfy the father's debt and such property is deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

The Karta has neither any share in the income nor in the property. It is the family, the corporate body, which is the owner of the property and if one member dies, it is still the family that remains the owner. If that is so, in a suit to recover joint family property, the Karta suing as such conducts the suit on behalf of the family. His name is used for the family. To borrow an expression from the Law of Partnership, it is a compendious way of describing the family. The death of the Karta does not make any difference to the suit at all. The family is there and the next Karta springs up and the family is described as suing by so and so (the next Karta).

This is the logical conclusion of the legal concept that underlies a joint Hindu family.

Mr. Asoke Sen on behalf of the respondent opposing the application referred me to *Rajendra Prasad* v. *Ganga Bux Singh* (1). In that case Misra J. referred to the definition of the term 'legal representative' in section 2, cl. 11 of the Code of Civil Procedure which is as follows:—

> "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

(1) [1945] A.I.R. Oudh, 60.

CIVIL.

1951.

Goneshmull Surana
v.
Nagraj Surana

*Banerjee, J.*

His Lordship said:

"In case of a joint Hindu family if the right to sue survives at all it survives in consequence of the fact that the estate of the deceased is represented by the survivors. If it does not, the action must terminate upon the death of the deceased party. If it is claimed that the right to sue survives it must come to the co-parceners as representatives of the deceased."

With great respect to the learned Judge, I am unable to see how any estate of the deceased can devolve. There is no estate at all as I have already tried to explain. Therefore, there cannot be any question of its devolution.

On these considerations, I hold that the suit has not abated. The application is an application to continue the suit, and I treat it as such as was done in Krishnaswami Iver's case. Goneshmull who was the karta of the joint family is dead. The petitioner as the next Karta represents the family and can go on with the suit on behalf of the family which was represented by Goneshmull before his death.

The petitioner, as it appears from the petition, was anxious to be brought on the record. He says for certain reasons he could not apply earlier. The family has got to get a large sum of money from the defendant. It cannot be and has not been suggested that the suit by Goneshmull was not for the benefit of the family.

Whether to an application of this kind any article of the Limitation Act applies, I need not consider now. In the present case I assume that article 181 applies and as this application has been made within three years from the death of Goneshmull, it is within time.

I allow the application. The petitioner will continue the suit as the Karta of the joint family. Necessary and consequential amendments may be made in the plaint and the suit will be heard in the usual way.

CIVIL.
1951.
Goneshmull Surana.
v.
Nagraj Surana
Banerjee, J.

Without prejudice to the right of any party to appeal from this judgment I give the following directions:

Within fourteen days from the date the amendments are made in the plaint, the defendant will be at liberty to file an additional written statement. There would be cross-order for discovery within fifteen days thereafter; inspection forthwith thereafter; the suit to be placed on the prospective list on the 2nd February, 1952. Costs of this application and of the additional written statement (if any) will be costs in the cause; certified for counsel.

*Mr. B. M. Bagoria*: Solicitor for the Petitioner.

*Mr. G. Bagoria*: Solicitor for the Respondent.

S.K.R.C. *Application allowed.*

## SUPREME COURT.

Present: *The Hon'ble Shri Harilal J. Kania, C.J., The Hon'ble Shri M. Patanjali Sastri, J., the Hon'ble Shri Bijan Kumar Mukherjee, J., the Hon'ble Shri Sudhi Ranjan Das, J., and the Hon'ble Shri N. Chandrasekhara Aiyar, J.*

CIVIL.
1951.
October, 5.

SRI SHANKARI PRASAD SINGH DEO AND OTHERS

*v.*

THE UNION OF INDIA AND OTHERS.*

*Constitution (First amendment) Act, 1951, if ultra vires—Constitution of India, Arts. 368, 4, 169 and 240—Three classes of amendments—Procedural difference—Agency which can amend the Constitution.*

*Constitution of India, art. 368—Not a complete code in itself.*

*Constitution of India, art. 379—Not to be interpreted in its isolated relation to art. 368 alone.*

* Petitions under Article 32 of the Constitution, challenging the validity of the Constitution (First Amendment) Act of 1951 Nos. 166, 287, 317 to 319, 371 to 372, 374 to 389, 392 to 395, 418, 481 to 485 of 1951.

CIVIL.

1951.

Sri Shankari Prasad Singh Deo and others
v.
The Union of India and others.

*Patanjali Sastri, J.*

*Constitution of India, art. 392—Adaptation of art. 368 by Constitution (Removal of Difficulties) Order No. 2 made by President, if valid.*

*Constitution of India, arts. 13, 368—"Law," what it means—Constitutional law, function of.*

*Constitution of India, arts. 31A and 31B—If valid.*

The Constitution provides for three classes of amendments of its provisions. *First*, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in arts. 4, 169 and 240 fall within this class and they are specifically excluded from the purview of art. 368. *Secondly*, those that can be effected by a special majority as laid down in art. 368. All Constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House present and voting; *thirdly*, those that require, in addition to the special majority above-mentioned, ratification by resolutions passed by not less than one-half of the States specified in Schedules A and B of the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to art. 368.

The power of effecting the first class of amendments is explicitly conferred on "Parliament," that is to say, the two Houses of Parliament and the President (art. 79).

The fact that a different majority in the same body is required for effecting the second and third categories of amendments cannot make the amending agency a different body.

Art. 368 is not a complete code in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained.

Having provided for the Constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (art. 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable, consistently with the express provisions of art. 368, when they entrusted to it the power of amending the Constitution.

*Local Government Board* v. *Arlidge* (1) referred to.

(1) [1915] A.C. 120.

There is nothing in art. 379 to suggest that the President should wait, before adapting a particular article, till an occasion actually arose for the Provisional Parliament to exercise the power conferred by that article. Nor is there any question here of the President removing by his adaptation any of the difficulties which the Constitution has deliberately placed in the way of its amendment. The adaptation leaves the requirement of a special majority untouched. The passing of an amendment bill by both Houses is no more a special requirement of such a bill than it is of any ordinary law made by Parliament The adaptation of art. 368 by the President was therefore well within the powers conferred on him by art. 392 and is valid and constitutional.

"Law" though ordinarily includes constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. Constitutional law is mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation.

Fundamental rights in Part III of the Constitution have been made immune from interference by law made by the State. But that does not mean that in the absence of a clear indication to the contrary those rights are also immune from constitutional amendment.

The terms of art. 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever.

In the context of art. 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that art. 13 (2) does not affect amendments made under art. 368.

Arts. 31A and 31B do not either in terms or in effect seek to make any change in art. 226 or in art. 132 and 136.

The power of the High Court under art. 226 to issue writs "for the enforcement of any of the rights conferred by Part III" or of this Court under arts. 132 and 136 to entertain appeals from orders issuing or refusing such writs are in no way affected.

*Held* accordingly that the Constitution (First Amendment) Act, 1951 passed by the present provisional Parliament purporting to insert, *inter alia* Arts 31A and 31B in the Constitution of India is not *ultra vires* and therefore constitutional.

CIVIL.

1951.

Sri Shankari Prasad Singh Deo and others
v.
The Union of India and others.

*Patanjali Sastri, J.*

Petitions raising the common question whether the Constitution (First Amendment) Act, 1951, which was recently passed by the present provisional Parliament and purports to insert *inter alia* Arts. 31A and 31B in the Constitution of India is *ultra* and unconstitutional.

The material facts will appear from the judgment.

*Shri P. R. Das,* Senior Advocate and *Shri B. Sen,* Advocate instructed by *Shri I. N. Shroff,* Agents for the Petitioners in Petitions No. 371, 372, 382, 383, 388 and 392 of 1951.

*Shri S. M. Bose,* Senior Advocate and *Shri M. L. Chaturvedi,* Advocate, instructed by *Shri Rajinder Narain,* Agent for the Petitioners in Petition No. 375 of 1951.

*Shri S. Chaudhuri,* Senior Advocate and *Shri M. L. Chaturvedi,* Advocate instructed by *Shri Rajinder Narain,* Agent for the Petitioners in Petition No. 378 of 1951.

*Shri M. L. Chaturvedi,* Advocate instructed by *Shri Rajinder Narain,* Agent for the Petitioners in Petitions Nos. 374, 376, 377, 379, 380, 381, 393, 394 and 395 of 1951.

*Shri N. P. Asthana,* Senior Advocate and *Shri K. B. Asthana,* Advocate instructed by *Shri Sant Saran Shukla,* Agent for the Petitioners in Petitions No. 481 to 484 of 1951.

*Shri S. K. Dar,* Senior Advocate and *Shri Nanak Chand* and *Shri M. L. Chaturvedi,* Advocates instructed by *Shri Sant Saran Shukla,* Agent for the Petitioners in Petition No. 387 of 1951.

*Shri S. P. Sinha,* Senior Advocate and *Shri Nanak Chand,* Advocate instructed by *Shri Sant Saran Shukla,* Agent for the Petitioners in Petition No. 485 of 1951.

*Shri Bishan Singh,* Advocate instructed by *Shri Sant Saran Shukla,* Agent for the Petitioners in Petition No. 418 of 1951.

*Shri M. L. Chaturvedi,* Advocate instructed by *Shri Sant Saran Shukla,* Agent for the Petitioners in Petitions Nos. 384, 385, 386 and 389 of 1951.

*Shri N. R. Raghavachari*, Senior Advocate and *Shri V. N. Swami*, Advocate instructed by *Shri M. S. K. Sastri*, Agent for the Petitioners in Petition No. 166 of 1951.

*Shri N. C. Chatterjee*, Senior Advocate and *Shri V. N. Swami*, Advocate instructed by *Shri Rajinder Narain*, Agent for the Petitioners in Petition No. 287 of 1951.

*Shri Abdul Razzak Khan* and *Shri P. S. Safeer*, Advocates instructed by *Shri R. S. Narula*, Agent for the Petitioners in Petition No. 317 of 1951.

*Shri N. C. Chatterjee*, Senior Advocate and *Shri Abdul Razzak Khan*, Advocate instructed by *Shri Ganpat Rai*, Agent for the Petitioners in Petition No. 318 of 1951.

*Shri N S. Bindra*, Senior Advocate and *Shri Kahan Chand Chopra*, Advocate instructed by *Shri R. S. Narula*, Agent for the Petitioners in Petition No. 319 of 1951.

*Shri M. C. Setalvad*, Attorney-General for India and *Shri G. N. Joshi*, Advocate instructed by *Shri P. A. Mehta*, Agent for the Union of India.

*Shri M. C. Setalvad*, Attorney-General for India and *Shri Lal Narain Singh, Shri G. N. Joshi, Shri Kuppuswami Alladi* and *Shrimati G. Durgabai*, Advocates instructed by *Shri P. A. Mehta*, Agent for the State of Bihar.

*Shri P. L. Banerjee*, Advocate-General of Uttar Pradesh and *Shri K. L. Mishra* and *Shri Gopalji Mehrotra*, Advocates instructed by *Shri P. A. Mehta*, Agent for the State of Uttar Pradesh.

*Shri T. L. Shevde*, Advocate-General of Madhya Pradesh and *Shri T. P. Naik*, Advocate instructed by *Shri P. A. Mehta*, Agent for the State of Madhya Pradesh.

The judgment of the Court was delivered by:—

CIVIL.

1951.

Sri Shankari Prasad Singh Deo and others
v.
The Union of India and others.

*Patanjali Sastri, J.*

**Patanjali Sastri J.:**—These petitions, which have been heard together, raise the common question whether the Constitution (First Amendment) Act, 1951, which was recently passed by the present provisional Parliament and purports to insert, *inter alia*, arts. 31A and 31B in the Constitution of India is *ultra vires* and unconstitutional.

What led to that enactment is a matter of common knowledge. The political party now in power, commanding as it does a majority of votes in the several State legislatures as well as in Parliament, carried out certain measures of agrarian reform in Bihar, Uttar Pradesh and Madhya Pradesh by enacting legislation which may compendiously be referred to as Zemindary Abolition Acts. Certain zemindars, feeling themselves aggrieved, attacked the validity of those Acts in courts of law on the ground that they contravened the fundamental rights conferred on them by Part III of the Constitution. The High Court at Patna held that the Act passed in Bihar was unconstitutional while the High Courts at Allahabad and Nagpur upheld the validity of the corresponding legislation in Uttar Pradesh and Madhya Pradesh respectively. Appeals from those decisions are pending in this Court. Petitions filed in this Court by some other zemindars seeking the determination of the same question are also pending. At this stage, the Union Government, with a view to put an end to all this litigation and to remedy what they considered to be certain defects brought to light in the working of the Constitution, brought forward a bill to amend the Constitution, which, after undergoing amendments in various particulars, was passed by the requisite majority as the Constitution (First Amendment) Act, 1951, (hereinafter referred to as the Amendment Act). Swiftly reacting to this move of the Government, the zemindars have brought the present petitions under art. 32 of the Constitution impugning the Amendment Act itself as unconstitutional and void.

The main arguments advanced in support of the petitions may be summarised as follows:

*First*, the power of amending the Constitution provided for under art. 368 was conferred not on Parliament but on the two Houses of Parliament as a designated body and, therefore, the

provisional Parliament was not competent to exercise that power under art. 379:

*Secondly*, assuming that the power was conferred on Parliament, it did not devolve on the provisional Parliament by virtue of art. 379 as the words "All the powers conferred by the provisions of this Constitution on Parliament" could refer only to such powers as are capable of being exercised by the provisional Parliament consisting of a single chamber. The power conferred by art. 368 calls for the co-operative action of two Houses of Parliament and could be appropriately exercised only by the Parliament to be duly constituted under Ch. 2 of Part V:

*Thirdly*, the Constitution (Removal of Difficulties) Order No. 2 made by the President on 26th January 1950, in so far as it purports to adapt art. 368 by omitting "either House of" and "in each House" and substituting "Parliament" for "that House", is beyond the powers conferred on him by art. 392, as "any difficulties" sought to be removed by adaptation under that article must be difficulties in the actual working of the Constitution during the transitional period whose removal is necessary for carrying on the Government. No such difficulty could possibly have been experienced on the very date of the commencement of the Constitution:

*Fourthly*, in any case art. 368 is a complete code in itself and does not provide for any amendment being made in the bill after it has been introduced in the House. The bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in art. 368:

*Fifthly*, the Amendment Act, in so far as it purports to take away or abridge the rights conferred by Part III of the Constitution, falls within the prohibition of art. 13 (2):

And *lastly*, as the newly inserted articles 31A and 31B seek to make changes in arts. 132 and 136 in Ch. 4 of Part V and art. 226 in Ch. 5 of Part VI, they require ratification under cl. (b) of the proviso to art. 368, and not having been so ratified,

CIVIL.

1951.

Sri Shankari Prasad Singh Deo and others
v.
The Union of India and others.

*Patanjali Sastri, J.*

they are void and unconstitutional. They are also *ultra vires* as they relate to matters enumerated in List II, with respect to which the State legislatures and not Parliament have the power to make laws.

Before dealing with these points it will be convenient to set out here the material portions of arts. 368, 379 and 392, on the true construction of which these arguments have largely turned.

368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) arts. 54, 55, 73, 162 or 241, or
(b) Ch. 4 of Part V, Ch. 5 of Part VI, or Ch. 1 of Part XI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or
(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

379. (1) Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution shall be the provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament.

392. (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient:

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Ch. 2 of Part V.

* * * *

On the first point, it was submitted that whenever the Constitution sought to confer a power upon Parliament, it specifically mentioned "Parliament" as the donee of the power, as in arts. 2, 3, 33, 34 and numerous other articles, but it deliberately avoided the use of that expression in art. 368. Realising that the Constitution, as the fundamental law of the country, should not be liable to frequent changes according to the whim of party majorities, the framers placed special difficulties in the way of amending the Constitution and it was a part of that scheme to confer the power of amendment on a body other than the ordinary legislature, as was done by art. 5 of the American Federal Constitution. We are unable to take that view. Various methods of constitutional amendment have been adopted in written constitutions, such as by referendum, by a special convention, by legislation under a special procedure, and so on. But, which of these methods the framers of the Indian Constitution have adopted must be ascertained from the relevant provisions of the Constitution itself without any leaning based on *a priori* grounds or the analogy of other constitutions in favour of one method in preference to another. We accordingly turn to the provisions dealing with constitutional amendments.

(1)

Now, the Constitution provides for three classes of amendments of its provisions. *First*, those that can be effected by a bare majority such as that required for the passing of any ordinary law. The amendments contemplated in art. 4, 169 and 240

CIVIL.

1951.

Sri Shankari Prasad Singh Deo and others v. The Union of India and others.

*Patanjali Sastri, J.*

fall within this class, and they are specifically excluded from the purview of art. 368. *Secondly,* those that can be effected by a special majority as laid down in art. 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House present and voting; and *thirdly,* those that require, in addition to the special majority above-mentioned, ratification by resolutions passed by not less than one-half of the States specified in Schedules A and B of the First Schedule. This class comprises amendments which seek to make any change in the provisions referred to in the proviso to art. 368. It will be seen that the power of effecting the first class of amendments in explicitly conferred on 'Parliament", that is to say, the two Houses of Parliament and the President (art. 79). This would lead one to suppose, in the absence of a clear indication to the contrary, that the power of effecting the other two classes of amendments has also been conferred on the same body, namely, Parliament, for the requirement of a different majority, which is merely procedural, can by itself be no reason for entrusting the power to a different body. An examination of the language used in art. 368 confirms that view.

In the first place, it is provided that the amendment must be initiated by the introduction of a "bill in either House of Parliament", a familiar feature of parliamentary procedure (cf. art. 107 (1) which says "A bill may originate in either House of Parliament"). Then, the bill must be "passed in each House" —just what Parliament does when it is called upon to exercise its normal legislative function [art. 107 (2)]; and finally, the bill thus passed must be "presented to the President" for his "assent", again a parliamentary process through which every bill must pass before it can reach the statute-book (art. 111). We thus find that each of the component units of Parliament is to play its allotted part in bringing about an amendment to the Constitution. We have already seen that Parliament effects amendments of the first class mentioned above by going through the same three-fold procedure but with a simple majority. The fact that a different majority in the same body is required for effecting the second and third categories of amendments cannot

make the amending agency a different body. There is no force, therefore, in the suggestion that Parliament would have been referred to specifically if that body was intended to exercise the power. Having mentioned each House of Parliament and the President separately and assigned to each its appropriate part in bringing about constitutional changes, the makers of the Constitution presumably did not think it necessary to refer to the collective designation of the three units.

Apart from the intrinsic indications in art. 368 referred to above, a convincing argument is to be found in arts. 2, 3, 4, 169 and 240. As already stated, under these articles power is given to "Parliament" to make laws by a bare majority to amend certain parts of the Constitution; but in each case it is laid down that no such law should be deemed to be an amendment of the Constitution "for the purpose of art. 368." It would be quite unnecessary, and indeed inappropriate, to exclude these laws from the operation of art. 368, which requires a special majority, if the power to amend under the latter article was not also given to Parliament.

Somewhat closely allied to the point discussed above is the objection based on the bill in the present case having been passed in an amended form, and not as originally introduced. It is not correct to say that art. 368 is a "complete code" in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. Evidently, the rules made by each House under art. 118 for regulating its procedure and the conduct of its business were intended, so far as may be, to be applicable There was some discussion at the Bar as to whether the process of amending the Constitution was a legislative process. Petitioners' counsel insisted that it was not, and that, therefore, the "legislative procedure" prescribed in art. 107, which specifically provides for a bill being passed with amendments, was not applicable to a bill for amending the Constitution under art. 368. The argument was further supported by pointing out that if amendment of such a bill were permissible, it must be open to either House to propose and pass amendments, and in case the two Houses failed to agree, the whole machinery of art. 368

Civil.

1951.

Sri Shankari Prasad Sigh Deo and others v. The Union of India and others.

*Patanjali Sastri, J.*

would be thrown out of gear, for the joint sitting of both Houses passing the bill by a simple majority provided for in art. 108 in the case of ordinary bills would be inapplicable in view of the special majority required in art. 368. The argument proceeds on a misconception. Assuming that amendment of the Constitution is not legislation even where it is carried out by the ordinary legislature by passing a bill introduced for the purpose and that arts. 107 to 111 cannot in terms apply when Parliament is dealing with a bill under art. 368, there is no obvious reason why Parliament should not adopt, on such occasions, its own normal procedure, so far as that procedure can be followed consistently with statutory requirements. Repelling the contention that a Local Government Board conducting a statutory enquiry should have been guided by the procedure of a court of justice, Lord Haldane observed in *Local Government Board* v. *Arlidge* (1):

> "Its (the Board's) character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended to follow the procedure which is its own and is necessary if it is to be capable of doing its work efficiently."

These observations have application here. Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (art. 118), the makers of the Constitution must be taken to have intended Parliament to follow that procedure, so far as it may be applicable, consistently with the express provisions of art. 368, when they entrusted to it the power of amending the Constitution.

The argument that a power entrusted to a Parliament consisting of two Houses cannot be exercised under art. 379 by the Provisional Parliament sitting as a single chamber overlooks the scheme of the constitutional provisions in regard to Parliament. These provisions envisage a Parliament of two Houses function-

(1) [1915] A.C. 120.

ing under the Constitution framed as they have been on that basis. But the framers were well aware that such a Parliament could not be constituted till after the first elections were held under the Constitution. It thus became necessary to make provision for the carrying on, in the meantime, of the work entrusted to Parliament under the Constitution. Accordingly, it was provided in art. 379 that the Constituent Assembly should function as the provisional Parliament during the transitional period and exercise all the powers and perform all the duties conferred by the Constitution on Parliament. Art. 379 should be viewed and interpreted in the wider perspective of this scheme and not in its isolated relation to art. 368 alone. The petitioners' argument that the reference in art. 368 to "two Houses" makes that provision inapplicable to the provisional Parliament would equally apply to all the provisions of the Constitution in regard to Parliamentary action and, if accepted, would rob art. 379 of its very purpose and meaning. It was precisely to obviate such an argument and to remove the difficulty on which it is founded and other difficulties of a like nature in working the Constitution during the transitional period that the framers of the Constitution made the further provision in art. 392 conferring a general power on the President to adapt the provisions of the Constitution by suitably modifying their terms. This brings us to the construction of art. 392.

It will be seen that the purpose for which an adaptation may be made under that article is widely expressed. It may be made for the purpose of removing "any difficulties." The particularisation of one class of difficulties which follows is illustrative and cannot have the effect of circumscribing the scope of the preceding general words. It has been urged, however, that the condition precedent to the exercise of powers under art. 392 is the existence of difficulties to be removed, that is to say, difficulties actually experienced in the working of the Constitution whose removal would be necessary for carrying on the Government, such as for instance, the difficulties connected with applying arts. 112, 113, etc., in the transitional period. But, the argument proceeds, constitutional amendments cannot be said to be necessary during that period. Besides, amendment of the Constitution is a very serious thing, and hence, by providing that both Houses must deliberate and agree to the amend-

CIVIL,

1951.

Sri Shankari Prasad Singh Deo and others v. The Union of India and others.

*Patanjali Sastri, J.*

ment proposed and pass the bill by a special majority, the Constitution has purposely placed difficulties in the way of amending its provisions. It would be fantastic to suppose that, after deliberately creating those difficulties, it has empowered the President to remove them by a stroke of his pen. We see no force in this line of argument. It is true enough to say that difficulties must exist before they can be removed by adaptation, but they can exist before an occasion for their removal actually arises. As already stated, difficulties are bound to arise in applying provisions, which, by their terms are applicable to a Parliament of two Houses, to the provisional Parliament sitting as a single chamber. Those difficulties, arising as they do out of the inappropriateness of the language of those provisions as applied to the provisional Parliament, have to be removed by modifying that language to fit in with the situation created by art. 379. There is nothing in that article to suggest that the President should wait, before adapting a particular article, till an occasion actually arose for the provisional Parliament to exercise the power conferred by that article. Nor is there any question here of the President removing by his adaptation any of the difficulties which the Constitution has deliberately placed in the way of its amendment. The adaptation leaves the requirement of a special majority untouched. The passing of an amendment bill by both Houses is no more a special requirement of such a bill than it is of any ordinary law made by Parliament. We are, therefore, of opinion that the adaptation of art. 368 by the President was well within the powers conferred on him by art. 392 and is valid and constitutional.

A more plausible argument was advanced in support of the contention that the Amendment Act, in so far as it purports to take away or abridge any of the fundamental right, falls within the prohibition of art. 13 (2) which provides that "the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention be void." The argument was put thus: "The State" includes Parliament (art. 12) and "law" must include a constitutional amendment. It was the deliberate intention of the framers of the Constitution, who realised the sanctity of the fundamental rights conferred by Part III, to make them immune from interference not only by

ordinary laws passed by the legislatures in the country but also from constitutional amendments. It is not uncommon to find in written constitutions a declaration that certain fundamental rights conferred on the people should be "eternal and inviolate" as for instance art. 11 of the Japanese Constitution. Article 5 of the American Federal Constitution provides that no amendment shall be made depriving any State without its consent "of its equal suffrage in the Senate." The framers of the Indian Constitution had the American and the Japanese models before them, and they must be taken to have prohibited even constitutional amendments in derogation of fundamental rights by using aptly wide language in art. 13 (2). The argument is attractive, but there are other important considerations which point to the opposite conclusion.

Although "law" must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. Dicey defines constitutional law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State." It is thus mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation. No doubt our constitution-makers, following the American model, have incorporated certain fundamental rights in Part III and made them immune from interference by laws made by the State. We find it, however, difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make those rights immune from constitutional amendment. We are inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of the rights of the subjects by the legislative and the executive organs of the State by means of laws and rules made in exercise of their legislative power and not the abridgement or nullification of such rights by alterations of the Constitution itself in exercise of sovereign constituent power. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise must be difficult and rare. On the other hand, the terms of art. 368 are perfectly general and empower

CIVIL.

1951.

Sri Shankari Prosad Singh Deo and others v. The Union of India and others.

*Patanjali Sastri, J.*

Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. In short, we have here two articles each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualified by the other. Having regard to the considerations adverted to above, we are of opinion that in the context of art. 13 "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that art. 13(2) does not affect amendments made under art. 368.

It only remains to deal with the objections particularly directed against the newly inserted arts. 31A and 31B. One of these objections is based on the absence of ratification under art. 368. It was said that. before these articles were inserted by the Amending Act, the High Courts had the power under art. 226 of the Constitution to issue appropriate writs declaring the Zemindari Abolition Acts unconstitutional as contravening fundamental rights, and this Court could entertain appeals from the orders of the High Courts under art. 132 or art. 136. As a matter of fact, some High Courts had exercised such powers and this Court had entertained appeals. The new articles, however. deprive the High Courts as well as this Court of the power of declaring the said Acts unconstitutional, and thereby seek to make changes in Ch. 4 of Part V and Ch. 5 of Part VI. It was therefore submitted that the newly inserted articles required ratification under the proviso to art. 368. The argument proceeds on a misconception. These articles so far as they are material here, run thus:

31A. *Saving of laws providing for acquisition of estates, etc.*—(1) Notwithstanding anything in the foregoing provisions of this part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

31B. *Validation of certain Acts and Regulations.*—Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

It will be seen that these articles do not either in terms or in effect seek to make any change in art. 226 or in art. 132 and 136. Art. 31A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of art. 13 read with other relevant articles in Part III, while art. 31B purports to validate certain specified Acts and Regulations already passed, which, but for such a provision, would be liable to be impugned under art. 13. It is not correct to say that the powers of the High Court under art. 226 to issue writs "for the enforcement of any of the rights conferred by Part III" or of this Court under arts. 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases.

The other objection that it was beyond the power of Parliament to enact the new articles is equally untenable. It was said that they related to land which was covered by Item 18 of List II of the Seventh Schedule and that the State legislatures alone had the power to legislate with respect to that matter. The answer is that, as has been stated, arts. 31A and 31B really seek to save a certain class of laws and certain specified laws already passed from the combined operation of art. 13 read with other relevant articles of Part III. The new articles being thus essentially amendments of the Constitution, Parliament alone had the power

CIVIL.

1951.

Sri Shankari Prosad Singh Deo v. The Union of India and others.

*Patanjali Sastri, J.*

of enacting them. That the laws thus saved relate to matters covered by List II does not in any way affect the position. It was said that Parliament could not validate a law which it had no power to enact. The proposition holds good where the validity of the impugned provision turns on whether the subject-matter falls within or without the jurisdiction of the legislature which passed it. But to make a law which contravenes the constitution constitutionally valid is a matter of constitutional amendment, and as such it falls within the exclusive power of Parliament. The question whether the latter part of art. 31B is too widely expressed was not argued before us and we express no opinion upon it.

The petitions fail and are dismissed with costs.

R.M. *Petitions dismissed with Costs.*

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## ORIGINAL CIVIL.

*Before Mr. Justice A. K. Sarkar.*

CIVIL.

1951.

*July, 26.*

S. B. TRADING CO. LTD.

*v.*

OLYMPIA TRADING CORPORATION LTD. & ANOTHER.*

*Suit for ejectment—Defence struck out—Plaintiff still to prove its case.*

*Original Side Rules, Chapter IX, rules 3 and 4, Chapter XIV, rule 3—Exparte hearing, meaning of.*

*Suit—How can it be defended.*

*West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, Section 14—Proviso, what it contemplates.*

* Original Civil Suit No. 1835 of 1951.

CIVIL.

1951.

S. B. Trading Co. Ltd. v. Olympia Trading

*Sarkar, J.*

In a suit, though the defence may have been struck out, the plaintiff has yet to prove its case before a decree can be passed in its favour, for the striking out of the defence does not amount to an admission by the defendants of the plaintiff's claim.

The *exparte* hearing contemplated in rules 3 and 4 of Chapter IX of the original side Rules takes place when the defendant does not enter appearance or fails to file a written statement. No other kind of *exparte* hearing is contemplated by the rules and that being so, the *exparte* hearing mentioned in Chapter XIV, rule 3 cannot be taken as including a case, where the defence after having been put in a stands struck out.

A suit cannot only be defended by filing a written statement or by entering appearance under the High Court Original Side Rules but may ably and sucessfully be defended by the defendant by cross-examination and argument.

*Debendra Nath Dutt* v. *Satyabala Dassi* (1) followed.

The proviso to Section 14 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 really contemplates a defence to the claim for ejectment and if that defence is struck out, it is no longer open to the defendants to contest the existence of the facts giving rise to the applicability of the proviso. Hence it was *held* that the defendants in the present case are not entitled to take part in the proceedings for proof of the applicability of the proviso.

Suit for ejectment.

The material facts will appear from the judgment.

*Mr. S. Roy* for the Plaintiff.

*Mr. Dipak Chowdhury* for the Defendants.

The judgment of the Court was as follows:—

**A. K. Sarkar, J.**:—In this suit, which is for ejectment, I have already delivered a judgment striking out the defence against ejectment, as the defendants had not complied with an order made under section 14 (4) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. Though the defence may have been struck out, the plaintiff has yet to prove

(1) (1950) 54 C.W.N. 110.

CIVIL.

1951.

S B. Trading Co. Ltd. v. Olympia Trading

*Sarkar, J*

its case before a decree can be passed in its favour, for the striking out of the defence does not amount to an admission by the defendants of the plaintiff's claim. Of course I am now only concerned with that part of the plaintiff's claim which deals with the ejectment of the defendants. When the plaintiff proceeded to prove its claim for ejectment the defendants' claimed to take part in the proceedings to oppose the decree for ejectment. In the present judgment I propose to deal with the defendants' right to oppose the decree for ejectment.

The first ground on which the defendants pressed their claim is based on Ch. XIV, r. 3 of the rules of the Original Side of this Court. That rule provides that "where the suit is heard exparte against any defendant, such defendant may be allowed to cross-examine, in person, the plaintiff's witnesses, and to address the court." Learned Counsel for the defendants argued that his clients' defence having been struck out the suit is being heard exparte against them and therefore he is entitled to cross-examine and to address the Court, and he proposed to do so not as counsel but as agent of his clients. Mr. Roy for the plaintiff has contended that the exparte hearing contemplated in this rule is the exparte hearing provided under the Original Side rules. He has drawn my attention to rules 3 and 4 of Ch. IX of the Original Side Rules. The exparte hearing contemplated in these rules takes place when the defendant does not either enter appearance or fails to file a written statement. Mr. Roy contends that no other kind of exparte hearing is contemplated by the rules, and that being so, the exparte hearing mentioned in Ch. XIV rule 3 cannot be taken as including a case where the defence after having been put in stands struck out. Though I am not prepared to reject this argument, I would prefer to rest my decision on a different ground. Section 14 (4) of the Rent Act provides that upon default in paying the rent in terms of an order for payment thereof made under it, "the Court shall order the defence against the ejectment to be struck out *and the tenant to be placed in the same position as if he had not defended the claim to ejectment.*" It seems to me that if I allow the defendants in this case to cross-examine the plaintiff's witnesses on their evidence as to the facts establishing the claim to ejectment and to address the Court with regard to that claim, I am really allowing the defendants to defend the claim against

ejectment. Section 14 (4) says that this the defendants cannot do. This view is supported by what P. B. Mukharji J. said in *Debendra Nath Dutt* v. *Satyabala Dassi* (1). The learned Judge said at p. 116:—

> "I have not been able to persuade myself to take the view that a suit can only be defended by filing a written statement or by 'entering appearance' under the Rules . . . . . A defendant in my judgment may ably and sucessfully defend a suit against him by cross-examination and argument."

For this reason I am unable to hold that the defendants are in this case entitled to cross-examine the plaintiff's witnesses and address me on that part of this case which is concerned with their ejectment.

Then it was said by learned counsel for the defendants that under section 14, sub-sections (1), (2) and (3), I cannot in any event pass a decree in ejectment forthwith These sub-sections are set out below:—

> "14. (1) If in a suit for recovery of possession of any premises from the tenant the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of section 12, the Court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof up to the date of the order mentioned hereafter, as also the amount of interest on such arrears of rent calculated at the rate of nine and three-eights per centum per annum from the day when the rents became arrears up to such date together with the amount of such costs of the suit as is fairly allowable to the plaintiff-landlord, and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before a date fixed in the order.
>
> (2) Such date fixed for payment shall be fifteenth day from the date of the order, excluding the day of the order,

(1) (1950) 54 C.W.N. 110.

Civil.

1951.

S. B. Trading Co. Ltd. v. Olympia Trading

*Sarkar, J*

(3) If within the time fixed in the order under sub-section (1), the tenant deposits in the Court the sum specified in the said order, the suit so far as it is a suit for recovery of possession of the premises, shall be dismissed by the Court. In default of such payment the Court shall proceed with the hearing of the suit:

Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (1) of the proviso to sub-section (1) of section 12 on three occasions within a period of eighteen months."

This is a case in which the plaintiff would not be entitled to a decree for possession, but for section 12, (1), (i). That being so, the Court would be bound to give the defendants an opportunity to pay off all arrears and to dismiss the claim for ejectment if the arrears were paid off as directed by the Court. But the right to have this opportunity does not exist if the tenant makes default in payment of two months' rents on three occasions within a period of 18 months. That is the effect of the proviso appearing in the section after sub-section 3. Learned counsel for the defendants argued that an issue as to whether his clients had defaulted in payment of two months' rents on three occasions within 18 months therefore necessarily arises and has to be decided by the Court irrespective of whether his clients' defence had been struck out or not. Mr. Roy admitted that his clients will certainly have to prove that the proviso applied but he contended that in such proof the defendants cannot take any part; in other words he says he will prove that default in payment of two months' rents had occurred on more than three occasions within 18 months in a manner as if he was doing it in a case in which the defendants did not appear. He said that under sub-section 1, in deciding whether the defendants should have an opportunity to pay off the arrears and thereby avoid an ejectment decree, the Court has to take into consideration the effect of an order made sub-section 4. He said that the effect of that order in the present case is to strike out the defence and therefore the defendants could not oppose the proof of the facts giving rise to the applicability of the proviso. He further contended that his claim to the ejectment had been based on default in payment of

two months' rents on more than three occasions within 18 months, and he drew my attention to the relevant paragraphs of the plaint in which this case had been made out. He also pointed out to me that the written statement denied these paragraphs in the plaint. Thus, he contended, the sole defence to the ejectment in this case was whether there had been default in payment of two months' rents on more than three occasions within 18 months, and that defence has already been struck out. It would be a curious result and really would amount to annulling the provisions of sub-section 4, if in spite of the defence being struck out the defendants were in a position to contest the applicability of the proviso. In my view this latter argument of learned counsel for the plaintiff is plainly sound. The proviso itself says that on certain things happening "the tenant shall not be entitled to the benefit of protection against eviction under this section." So the proviso really contemplates a defence to the claim for ejectment, and if that defence is struck out, it must necessarily mean that it is no longer open to the defendants to contest the existence of the facts giving rise to the applicability of the proviso. I therefore reach the conclusion that the defendants will not be allowed to take any part in the proceedings for proof of the appplicability of the proviso.

Learned counsel for the defendants took another point which is really germane to the matter which has been decided by my previous judgment. He said that an order under section 14 (4) had to provide for "deposit" and the order of Bachawat J. of the 17th of May, 1951, provided for payment to the plaintiff and for this reason that order was really not an order under sub-section 4. The answer to this seems to be that the learned Judge had expressly made the order under that sub-section, and whether it was in terms of the sub-section or not is not for me to decide. If that order was not in those terms the defendants should have appealed. In the absence of the appeal I have to accept that it is an order under section 14 (4) as it is expressed to be. Then, again, it would be remembered that that order was by consent and, therefore, I take it the defendants waived the provision in the sub-section as to deposit in Court and agreed to the payment being made directly to the plaintiff as they had full right to do, and it is, consequently, no longer open to them to challenge the validity of the order on this ground.

CIVIL

1951.

S. B. Trading Co Ltd.
v.
Olympia Trading

*Sarkar, J.*

The result, therefore, is that all the objections of the defendants are rejected and the plaintiff will now proceed to prove its claim to the ejectment and the defendants will not be allowed to take any part in the proceedings connected with such proof.

*Messrs. N. C. Bural & Pyne*: Solicitors for the Plaintiff.

*Messrs. R. M. Chatterjee & Co.*: Solicitors for the Defendants.

R.M.

*Plaintiff to proceed to prove its claim.*

# Index of Cases.

## Vol. 88

"A"


PAGE

**Abatement of Suit**—Suit filed by *Karta* of a Hindu Joint family—Whether the suit abates on the death of the *Karta*—Hindu system of property discussed—Function and position of the *Karta* of a Hindu joint family ... ... ... ... ... 271

**Arbitration**—Dispute over extension of time for supply as originally fixed—If such subsequent agreement governed by arbitration clause in the original contracts—Circumstances under which subsequent agreements are governed; *see* ... ... ... ...

**Khusiram Banarshilal** *v.* **Kian Gwan Co. (Calcutta) Ltd.** ... 165

**Arbitration**—Setting aside an award—Misconduct, what is—Measure of damage—Damages on the basis of black market price—Evidence of extension of time—Duty of the Bengal Chamber of Commerce to take evidence—Rules of the Bengal Chamber of Commerce—Jute Price Control Order ... ... ... ... ... 202


"B"


**Bengal Agricultural Debtors Act,** (VII B.C. of 1936) section 37A—Application for relief by one co-sharer within prescribed time—Application not in prescribed form—Subsequent application in proper form but after time—Application by other co-shares—Withdrawal of the application by the first applicant—Subsequent applicants, if can get benefit of the application by the former applicant. *See*

**Lankeswar Haldar & ors.** *v.* **Ram Gopal Naskar & ors.** ... 180

**Bengal Money Lenders' Act** (X B.C. of 1940)—Decree re-opened—Order for restoration, appeal against—Court fee; *see*

**Routhmull Babu** *v.* **Kamalaksha Chowdhury** ... ... 133

**Bengal Money Lender's Act** (X of 1940)—Proceeding under, if a suit—Limitation for such proceeding.—Article 120 Limitation Act (IX of 1908)—Right when accrues—Such suit, if one for possession—Article 144 Limitation Act, if applies—Applications under the Act—Where no period of Limitation prescribed, proper Article 181 of the Limitation Act. *See*

**Sarvamangala Dasi** *v.* **Paritosh Kumar Das & ors.** ... ... 183

"C"

PAGE.

**Calcutta Municipal Act,** Section 17—Provisions of Rules 23, 30, 33 of the above schedule—Section 319 of the Act—'Domestic building' and 'dwelling house' definitions of—Exception under the proviso (ii) to Rule 30 (2) whether relates to three storied buildings only—Power of the Corporation to institute proceedings under Section 363 or under Section 498 of the Act, if discretionary or obligatory ... 78

**Calcutta Thika Tenancy Act** (II of 1949)—Section 28—Condition precedent for application—Thika tenant—Definition in section 2 (5)—System—Tests for determination—Rent receipts, if prove system—Bustee tenant, if a thika tenant. *See*

**Dharani Mohan Roy** *v.* **Ram Avatar Shaw** ... ... ... 108

**Certiorari, writ of**—Alternative remedy by way of appeal—If bars the issue of a Writ—Acquiescence with or submission to jurisdiction of the Tribunal—If stops a challenge to jurisdiction—Power to quash order in cases of wrong assumption of jurisdiction by a Tribunal ... 137

**Civil Procedure Code,** Section 115—High Court if can revise order passed by the lower Court deciding a claim under O. 38, R. 8 ... 102

**Civil Procedure Code,** Section 115—Revision against order passed under O. 21, R. 100, if lies when suit under rule 103 available. *See*

**Tulsi Charan Das** *v.* **Subal Chandra Das** ... ... ... 65

**Civil Procedure Code,** Section 152—Construction—Accidental slips or omission of parties, if can be corrected by Court—Misdescription of property in an agreement for sale upon which decree for specific performance obtained, if can be corrected—Delay, if any bar—Circumstances to be considered. *See*

**Bela Dabi** *v.* **Bon Behari Roy** ... ... ... ... 40

**Civil Procedure Code,** O. 8, R. 6—Set off, if includes counter claim—Distinction—Meaning of—Ascertained sum, what is—Claim of defendant, if can be decreed against plaintiff in the same action—Practice—Plaintiff giving up his claim—Decree, if can be passed in favour of the defendant based on his claim in set off. *See*

**D. M. Jackson** *v.* **Cliffords Hockley** ... ... ... 90

**Civil Procedure Code,** (Act V of 1908) Order XXI, rule 35, sub-rule 3—Delivery of possession under the above rule—Order to pull down structures in giving delivery of possession, if within the meaning of the rule—'In any other manner', if includes demolition of structures ... ... ... ... ... 27

PAGE.

**Civil Procedure Code,** O. 21, R. 100—Symbolical possession taken by auction purchaser—Forceful physical possession of tenant-judgment debtor—Remedy under the above rule, if available .. ... 65

**Civil Procedure Code,** O. 38 R. 8—Court, if can investigate the question of title to money which may ultimately be payable under certain bills. *See*

**Tamluk Loan Co., Ltd** *v.* **Kedar Nath Das** .. .. ... 102

**Consent decree**—Compromise of suit by Pardanshin Lady—Implied authorities of counsel and solicitor to compromise—Wife by her conduct held out the husband as the only means of communication between herself and her attorney—Risk of wrong instruction. *See*

**Rajlakshmi Biswas** *v.* **Nursingdas Binnany** ... ... .. 52

**Constitution of India,** Articles 13, 368—"Law", what it means—Constitutional Law, function of ... ... ... 281

**Constitution of India,** Articles 31A and 31B—If valid ... ... 281

**Constitution of India,** Article 226 (1), application under—Procedure relating to affidavits—High Court Appellate Side Rules ... 172

**Constitution of India,** Article 368—Not a Complete Code in itself ... 281

**Constitution of India,** Article 379—Not to be interpreted in its isolated relation to Article 368 alone .. ... ... ... 281

**Constitution of India,** Article 392—Adaptation of Article 368 by Constitution (Removal of Difficulties) Order No. 2 made by President, if valid ... ... ... .. ... ... 281

**Constitution (First Amendment) Act, 1951,** if ultra vires—Constitution of India, Articles 368, 4, 169 and 240—Three classes of amendments—Procedural difference—Agency which can amend the Constitution 281

**Contempt of Court**—Application by notice of motion—Form of the notice of motion—Service of notice—Nature of the proceedings for committal for contempt. *See*

**Hembala Dassi** *v.* **Sundar Shaw** ... ... ... ... 70

**Contract for Sale of land**—Rights of purchaser in case of non-performance—Earnest money, character of—Absence of forfeiture clause in the contract, effect of ... ... ... ... 149

**Court fees**—Appeal against decree passed under Bengal Money Lenders Act—Proper Court fee in relief against restoration ... ... 133

PAGE.

**Court's power to punish contempt by committal**—Always discretionary —Contempt application, purpose of *See*

**Gopi Mohan Bhattacharjee** *v.* **Sambhu Charan Nundy** .. .. 196

"H"

**Hindu Law**—Grant of property to a female relation—Power of alienation, if expressly to be given to create an absolute estate—Works of sufficient amplitude for conveying full right—Making the grantee a "malik," if clear enough to convey absolute estate.

**Ram Gopal** *v.* **Nand Lal** .. ... ... ... 1

"I"

**Indian Arbitration Act**—Application to set aside an award—Arbitrator's jurisdiction when satisfied about *prima facie* existence of contracts—Court may inquire into the existence of contract and decide arbitrator's jurisdiction—Indian Arbitration Act, Section 43—Power of arbitrators to move High Court to subpoena witness discretionary. *See*

**Pannalal Sagoremull** *v.* **Fateh Chand Murlidhar** ... .. 34

**Indian Contract Act** (IX of 1872) Sections 64, 65 and 74—Application in cases of earnest money .. ... ... 149

**Indian Penal Code,** Section 161 & 165—Onus to prove motive and/or inadequacy of consideration, if displaced by section 4 of Prevention of Corruption Act. .. ... .. 14

**Indian Railways Act**—Forwarding note for carriage of goods—Condition in—Reclassification and recalculation at destination of rates terminals & other charges, meaning of—If forms part of the contract—Position of assignee from the consignor or consignee. *See*

**Dominion of India** *v.* **Virjee Doya & Co.** ... ... ... 59

**Interlocutory consent orders**—May be discharged or varied on motion— But an undertaking in a final consent decree cannot be so discharged or varied ... ... ... ... ... ... 196

**Interpretation of Statute**—Chapter XXIX, Rule 5 of the Original side Rules. *See*

**Kanahyalal Rula** *v.* **Corporation of Calcutta** ... ... ... 78

"J"

**Jaipur Laws Act of 1923,** Section 3(b)—If saves resolutions which never acquired the force of law ... ... ... 265

"L"

PAGE.

**Legislation,** not possible—Without some kind of discrimination .. 233

"M"

**Magistrate**—Practice to send Magistrate as witness of Police-traps, deprecated; *See*

**M. C. Mitra** *v.* **The State** .. ... ... 14

"O"

**Original Side Calcutta High Court Rules**—Chapter XVII, rule 13—Application under Order XXI rule 35—Details, if to be stated in the application under the said order; *See*
**Peyari Churn Law** *v.* **Monmotha Nath Banerjee** 27

**Original Side Rules,** Chapter IX, Rules 3 and 4. Chapter XIV, Rule 3—Exparte hearing, meaning of .. 295

"P"

**Prevention of Corruption Act,** Section 4—Presumption under, nature of—When arises—How far affects the onus on the prosecution—Section 4, if applies to unconscious and unknowing transmitter or bearer—Presumption, how rebutted ... 14

**Prerogative writs**—Article 226(1) of the Constitution of India—If can be issued by the High Court against Union of India being outside territorial jurisdiction ... 172

**Proviso in a section of the Statute**—Does not alter the substance of the law—Substance to be gathered from the section including the proviso ... 233

"R"

**Rent Act, 1950,** amended section 18(5)—Interpretation of—Attracts proviso to section 14 of that Act—To be strictly construed and confined only to default contemplated in clause (1), section 12(1) of the Rent Act, 1950 ... 233

**Resolution,** mere passing of—Without promulgation or publication—Not sufficient to make it law in the absence of specific law or custom to the contrary ... 265

**Requisitioned Land (Constitution of Powers) Act, 1948**—Section 3—If affects continuance of requisitions made under previous legislations and ordinances Act and if ultra vires the Articles 14 and 31 of the Constitution ... ... 172

**Krishna Khandewal and Ors.** *v.* **Director of Land Hiring etc. and Ors.** 172

"S"

**Specific Relief Act,** Section 45—Sanction of building plan by the Corporation of Calcutta—Unauthorised and illegal constructions—

PAGE.

Whether adjudication of legal right is intended or can be made as between the applicant and any person who may be affected by the Calcutta Municipal Act under Section 45 of the Specific Relief Act 78

**Suit for Ejectment**—Statutory forfeiture under section 12(3) of the Rent Act of 1948—Suit pending on 30th March, 1950 or 30th November, 1950—No notice to quit given—Suit not rendered incompetent ... ... ... ... ... 233

**Suit for ejectment**—Defence struck out—Plaintiff still to prove its case ... ... ... ... ... 295

**Suit**—How can it be defended ... ... ... 295

**Suit for recovery of damages for use and occupation or alternatively mesne profits, if maintainable**—Prima facie proof of title—Prior possession under certain circumstances, sufficient prima facie evidence of title ... ... ... ... ... 126

"T"

**Transfer of Property Act**—Section 106—Notice under—Rules for construing notice—Demanding possession 'at the end of a month of tenancy which would expire next after 15 days from the receipt of the notice', if sufficient and valid in law ... ... 119

**Transfer of Property Act** (IV of 1882) Section 6 clause (e)—Right to recover damages or compensation transferred along with the transfer of a property—Valid assignment and not hit by section 6, Clause (e).

**Muralidhar Agarwalla** *v.* **Rupendra Nath Mitter** ... ... 126

"U"

**Under taking**—Primarily a matter between the Court and the litigant—Substantially a major consideration which induces the other party to agree to certain terms ... ... ... ... 196

"V"

**Vendor and Purchaser**—Respective rights to the earnest money. *See*

**Naresh Chand Guha** *v.* **Ram Chandra Samanta** ... ... 149

**War Injuries Ordinance** (VII of 1941) as amended by Ordinance Nos. 1 and XXXIX of 1942—If takes away all rights to sue in the Court for breach of contract or to claim under Workmen's Compensation Act ... ... ... 137

**West Bengal Premises Rent Control Act, 1950**—Sections 14, 18(5), if retrospective—Applicability of the sections. *See*

**Jatindra Nath Shee** *v.* **Malai Ram Shaw** ... ... ... 119

**West Bengal Premises Rent Control Act 1950**—Sub-tenant claiming right under—Decree against tenant—Possession obtained from tenant—Resistance by sub-tenant with respect to his occupation—

PAGE.

Application by sub-tenant for forbidding execution—Propriety—Landlords application for police help to evict—Procedure. *See*

**Debendra Nath Sarkar** *v.* **Parul Bala Ghose** ... ... 105

"W"

**West Bengal Premises Rent Control (Temporary Provisions) Act, 1950,** Section 14—Proviso, what it contemplates ... ... 295

**West Bengal Premises Rent Control Act, 1950,** Section 18(5)—If infringes fundamental right under Article 14 of the Constitution of India ... ... ... ... ... 233

**West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950),** Section 9(e) —Fixation of basic rent—Meaning of premises—Different portions of present 'premises' let out to different tenants in December, 1941—If 'Premises' not let out on 1st December, 1941. *See* ... ... ... ... 191

**Bata Shoe Co. Ltd.** *v.* **Narayan Das Mullick & Ors.** ... ... 191

**Workmen's Compensation Act** (VIII of 1923)—If applies in cases of War injuries. *See*

**Nalini Ranjan Guha** *v.* **Annada Sarkar Ray** ... ... 137

# THE CALCUTTA LAW JOURNAL

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# Index to Short Notes

## Vol. 88


PAGE.

Is marriage of an adopted son with a *sagotra* of his natural father prohibited? By Late Avinas Chandra Guha, M.A., B.L. ... ... ... ... 5*n*, 13*n*

Reviews ... ... ... ... ... 1*n*, 20*n*


# Notes of Cases


PAGE.

Clifford *v.* Charles H. Challen & Son Ltd. ... ... 12*n*

Indian Sugar Mills Association *v.* Secretary to Government, Uttar Pradesh Labour Department ... ... 4*n*

Paris *v.* Stepney Borough Council ... ... ... 4*n*


# Index to Notes of Cases

## Vol. 88


PAGE.

**Constitution of India, Art. 226**—Scope of—Persons entitled to apply ... ... ... ... ... 4*n*

**Employer, liability of**—Employee, a garage fitter, with only one eye—Need to provide goggles—Injury to the other eye ... ... ... ... ... 4*n*

**Master and servant**—Servant contracted dermatitis from using synthetic glue—Protection cream in store but not in workshop—Master's duty to provide a safe system of work ... ... ... ... 12*n*

The Calcutta Law Journal

VOL. 88 | CALCUTTA. | 19

# REVIEWS.

**Law, Liberty and Life** by the Hon'ble Mr. M. C. Chagla, Chief Justice of Bombay, published by Asia Publishing House, Bombay.

This is a miscellany of the writings and speeches of the Hon'ble Mr. Justice Chagla, which appeared, or were delivered by him, on various occasions in the course of his brilliant career as a public man, and which dealt with the three great L's of human existence. Mr. Justice Chagla had a distinguished political and social life before his elevation to the Bench. At one time he was an associate of Mr. Jinnah, but having a pure national out-look quite inconsistent with the latter's two-nations' theory, he could not maintain that association for long. In this book, however, we do not see much of his political views as it is mostly devoted to the fundamental rights and the social side of humanity. The volume is a small one and cannot be expected to give a complete picture of the mental out-look of its writer, but it has given enough to acquaint the reader with what the inner man is. The general public do not know much about Mr. Justice Chagla, as he never cared to be in the lime-light of public opinion, but all the same he has all through stood in the background of all movements for the uplift of humanity. The ideas that he has given vent to in this publication are all, in the abstract, very correct, but in the practical world we very often see that there are also two sides for every individual thing; and studied in the light of absolutism and relativity it is always very difficult to say which of these two sides should have preference in the matter of acceptance. The learned writer of the publication under review, in his robust optimism, has invariably looked to one side of the thing ignoring altogether the other one which is visible only to the cynic philosopher. It is here that some short coming is discernible

in his writings. Too much idealism turns a philosopher's eyes too much towards the skies and very little towards the hard ground underneath. We would have better appreciated his writings if he had condescended to come down a little from the high pedestal of absolute idealism to the lower level of human realities. Human life does not consist of sunshine alone, but comprises a good deal of stormy clouds also. All conceptions about law and liberty should be shaped and formed with a view to maintaining an even balance between these two opposing factors of life, and if that is not done there will be an eternal clash between them forcing all human philosophies to end in smoke. There is nothing fundamental or absolute in law and liberty, but everything in them is an eternal experiment on the possibility of a compromise between the opposing forces of life. Whatever might be the comment on his views, it cannot, however, be denied for a moment that the writer is a great philosopher with fresh outlooks. His manner of putting things and expressing his ideas is simply charming and fascinating. The book on the whole, we have not the least doubt, will be accepted on all hands as a high class literature.

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**Civil Court Practice and Procedure Manual** (India and Pakistan), 6th Edition by S. C. Sarkar, Published by S. C. Sarkar & Sons Ltd., 1951 :

This manual has long been before the legal world and there is hardly any lawyer who has had not some occasion or other to make use of it. So it hardly stands in need of any introduction at our hands. The very fact that it has gone through half a dozen editions is an unmistakeable proof of its immense utility. To a just beginner in the legal profession or to an apprentice its value as a practical guide to the practice and procedure of law Courts is inestimable. No doubt the rules of procedure can be collected from the Civil Procedure Code and the other relevant enactments themselves, but they are all scattered over such a wide field that

for a beginner to collect them all or to master them and then to keep them at beck and call may not be within the range of practical politics. It is here that the practical usefulness of the publication will be most appreciated. Within the short compass of a handy volume, the learned compiler has given a complete collection of the practical rules which every beginner in the legal profession must familiarise himself with at the very threshold of his career, just for a successful conduct of his client's cause. In the first few chapters of his work, the learned author has given a few preliminary instructions which his young lawyer readers will undoubtedly appreciate and profit by. In order to lend weight to these instructions the learned author has on occasions quoted from the utterances and observations of eminent jurists. For instance, we have the following quotation from Lord Eldon, which says that in order to achieve professional success, a lawyer has "to live like a hermit and work like a horse". The learned author might have as well supplemented Lord Eldon's saying by adding "and work as steadily as an ass." In the First Part of his work he has given all the rules from the Civil Procedure Code beginning with drafting of pleadings upon instructions of clients and carrying through the different stages of the progress and conduct of law suits down to their actual termination. In Part II, we have the procedural rules in connection with various proceedings under diverse special statutes. In Part III, a good many forms of plaints, written statements, important petitions, notices etc. have been appended. All these have undoubtedly enhanced the utility of the publication to a considerable extent. The publication has already got a happy career and bids fair to continue that career as steadily as ever. In point of get-up, the publication has definitely scored an advancement.

# Notes of Cases.

## Paris *v.* Stepney Borough Council.

[House of Lords: *Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott*, dated 13th December, 1950.]

1950.
[1951] 1 All. E. R. 42.

*Employer, liability of—Employee, a garage fitter, with only one eye—Need to provide goggles—Injury to the other eye.*

A was employed as a fitter in the garage of S. To the knowledge of S, A had the use of only one eye. He was striking a hammer to remove a bolt on a vehicle. A chip of metal flew off and entered his good eye. This eye was injured and A became totally blind. S did not provide goggles for A to wear:

*Held* (Lord Simonds and Lord Morton of Henryton *dissenting*) that goggles should have been provided for A and that S was liable in negligence.

R. M.

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## Indian Sugar Mills Association *v.* Secretary to Government, Uttar Pradesh Labour Department.

[Per *Malik, C. J., Sapru and V. Bhargava, JJ.*, dated 14th September, 1950.]

1950.
[1951] A. L. R. All. 1 F. B.

*Constitution of India, Art. 226—Scope of—Persons entitled to apply.*

*Held* that Art. 226 of the Constitution was not intended to provide an alternative method of redress to the normal process of a decision in an action brought in the usual Courts established by law. The powers under this article should be sparingly used and only in those clear cases where the rights of a person have been seriously infringed and he has no other adequate and specific remedy available to him.

*Held further* that only those persons whose interests are directly affected by a statute or an order can apply for redress under article 226 of the Constitution of India.

R. M.

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The Calcutta Law Journal

VOL. 88 | CALCUTTA. | 5*

# MARRIAGE : IS MARRIAGE OF AN ADOPTED SON WITH A *SAGOTRA* OF HIS NATURAL FATHER PROHIBITED ?

By

LATE SREE AVINAS CHANDRA GUHA, M.A., B.L.*

'I am of opinion that the marriage is valid.

The leading and decisive text on the question, cited by almost all the original authorities dealing with adoption and hereinafter referred to as the fundamental text, is that of Manu, IX, 142 :

গোত্ররিক্থে জনয়িতুর্ন হরেদ্দত্তিমঃ সুতঃ।
গোত্ররিক্থানুগঃ পিণ্ডো ব্যৈতি দত্তঃ স্বধা ॥

"An adopted son does not carry the *gotra* or the heritage of his genitor. The funeral cake follows the *gotra* and the heritage. The funeral repast passes away from him who gives (a son in adoption)". The translation is mine. An adopted son ceases, therefore, as a consequence of his adoption, to belong to the *gotra* of his natural father. Even the Dattaka-chandrika, citing the fundamental text, sums up its meaning thus (Sutherland, II. 19) :

এতেন দাতৃধনে দানাদেব পুত্রত্বনিবৃত্তিদ্বারা দত্তিমস্য স্বধনিবৃত্তির্দাতুর্গোত্রনিবৃত্তিশ্চ ভবতীত্যুচ্যতে।

"It is hereby declared that through the cessation of sonship by the very (fact of the) gift, there result for the adopted son a cessation of his right to the property of the giver and a cessation of

* At one time President, Bar Association, High Court, Calcutta and Professor of Hindu Law & Constitutional Law in the University Law College, Calcutta.

the giver's *gotra*". The translation is mine. A *sagotra* of the natural father of an adopted son is thus no longer a *sagotra* of the latter, and the ban of marriage, based on the indentity of *gotras*, disappears for him in the case of such a girl. There is no other text, either of Manu himself or any other law-giver, which formulates even indirectly, as I shall presently show, any exception, limitation or proviso to the general rule of the fundamental text, which is by its terms absolute in its application to the question of an adopted son's *gotra* for all purposes. The rule, no doubt, involves the possibility of an adopted son marrying his own natural sister or any other *sapinda* relation of his natural father ; for all relationship in the natural family, as the Vyavahara-mayukha (Mandlik's text, p. 43 and trans., p. 59) puts it, like that of a uterine brother, a paternal uncle, and the rest, ceases on adoption. But here other sacred texts like those of Briban-manu (Dattaka-mimansa, Sutherland Vl. 10) and Gautama (1. 4, 3 ; D.-m., Suth. Vl. 11) intervene, which ordain that the *sapinda*-relationship of an adopted son in his family of birth within certain degrees continues even after his adoption into another family. The Dattaka-mimansa relies on both these texts, the Sanskara-mayukha (Gujarati Printing Press, Bombay, 1913 ; p. 81) on that of Gautama alone. A *sagotra-sapinda* of the natural father of an adopted son is, according to these authorities, ineligible for marriage with the latter, not because she is a *sagotra*, but because she is a *sapinda*, of his natural father.

Against this view of the fundamental text and its necessary implications, which I think is the correct view, there is a view which was probably first stated by the author of the Smriti-chandrika (See its *sanskara-kanda*, *vivaha-prakarana*, in the Mysore *Bibliotheca Sanskrita*, No. 43, pp. 185, 186-187), one of the authorities in the Madras School, and re-appears in its pretended supplement, the Dattaka-chandrika (Suth. IV. 7-9), as well as in the Nirnaya-sindhu (Third *pariccheda*. First half, under the rubric *atha vivahah*, sub-rubric *atha dvigotrah*), the Dharma-sindhu (Third *pariccheda*. First half, *vivaha-prakarana*, under the rubric *atha dvigotrah*), the Viramitrodaya (*sanskara-prakasa*, *vivaha-prakarana* ; Chowkhamba Sanskrit Series, Benares, Vol. 1, pp. 655-658), the Balambhatti (*Vyavahara-Balambhatti*, Chowkhamba Sanskrit Series, Benares, p. 553, in commenting on the fundamental text), the Dattaka-darpana, and the Dattaka-didhiti (See Bharata Siromani, *Dattaka-siromani*, a collection of extracts

from eight works on adoption, Calcutta, 1867 ; pp. 304, 338. See, on this work, Jolly, Tagore Lectures, 1883, p. 23). According to the more prominent of these authorities, although by the fundamental text a *sagotra* of the natural father of an adopted son is not a *sagotra* of the latter, such a *sagotra* is nevertheless ineligible for marriage with him, not indeed as his own *sagotra*, but as a *sagotra* of his natural father ; and they found in support of this view ultimately on the text of Manu, III. 5, hereinafter referred to as the marriage-text. The Viramitrodaya and the Dattaka-didhiti further opine that the rule of the fundamental text is only applicable to cases of *arsèya-varana* at Vedic sacrifices, salutation, *sraddha*, &c., and not to that of marriage. And the Nirnaya-sindhu, which purports to rely on the Pravara-manjari, the Narayana-vritti, the Prayoga-parijata, "*et cetera*", and refers the reader to another work of its author, the Pravara-darpana, seems to think, apparently on the authority of a text cited in the Prayoga-parijata, that a son by adoption is *ipso facto* a *dvyamusyayana*, a son of two fathers, and therefore with two *gotras*. I am of opinion that the view, thus maintained in the treatises just mentioned, including the Dattaka-chandrika, is incorrect and untenable.

None of these treatises, however, except perhaps the Dattaka-chandrika, is an authority in our School of the Hindu law. I shall nevertheless deal with all of them, one by one.

First, the Nirnaya-sindhu and the Dharma-sindhu. Of the authorities cited in the former work, the Pravara-manjari and the Pravara-darpana have not, as far as I know, yet been printed, and are inaccessible to me. It appears, at any rate, from the passage of the Pravara-manjari, cited in the Dattaka-mimansa (Suth. VI. 48), that, according to its author, all adopted sons do not have two *gotras*, but that some may (यथासम्भवम् "wherever possible" ; mistranslated by Suth. "for the most part"). The Narayana-vritti referred to here is in all probability no other than the *vritti* of Gargya Narayana on the Asvalayana-Srautasutra, for the *vritti* of Naidhruva Narayana on the Asval—Grihyasutra does not deal with the matter at all. In commenting on Asval—Sr. s. XII. 13, G. Narayana explains in the first place that the *Saunga-Saisiris* are the descendants of a *Kshatraja* son, begotten by a Saisiri of the *gotra* of the Katas (a sub-division of the Visvamitra-gotra) on the wife of a Sunga of the Bharadvaja-gotra, that they are *dvyamusyayanas* and have *pravaras* derived from both the

*gotras*, and that the Saunga-Saisiris are named here by way of illustration only. He then defines a *dvyam*, citing Yajnavalkya, II. 127 (অপুত্রেণ পরক্ষেত্রে নিয়োগোৎপাদিতঃ সুতঃ। উভয়োরপ্যসৌ বিত্তে পিণ্ডদাতা চ ধর্মতঃ॥), as a son begotten by a sonless person on another person's wife by *niyoga*, adding that it is thus alone that a *dvyam.* arises and *not otherwise*. He concludes by saying that marriage is forbidden to a *dvyam.* on either side, and that Gautama's text, referred to above which contains the word দ্বীষিন্ has no application to a case other than that of a *dvyamushyayana* (so too Haradatta on that text: Anandasrama ed., p. 28) G. Narayana, therefore, lends no support to any theory of a son by adoption being *ipso facto* a *dvyam.* Lastly, the Prayoga-parijata, on which too the Nirnaya-sindhu relies, quotes without comment an anonymous text, which in the printed edition of its *sanskara-kanda* (Nirnayasagar Press, Bombay, 1916; p. 311) reads thus:

দ্ব্যামুষ্যায়ণকাঃ সর্বে দত্তকক্রীতকাদয়ঃ।
গোত্রদ্বয়েঽপ্যনুঢ়াহঃ তদ্বৈশিশিরয়োস্তথা॥

দত্তকক্রীতকাদয়ঃ is obviously a misprint for দত্তকক্রীতকাদয়ঃ, and so, I think, is তথা for যথা. A variant of this text is cited in the Dattaka-chandrika (Suth. II. 40; also anonymously), the Dattaka-mimansa (Suth. VI. 47; referring it to the Parijata itself), and the Vyavahara-mayukha (Mandlik's text, p. 44; ascribing the text to a Pravaradhyaya), with slight, wholly negligible variations *inter se*. in this form:

দ্ব্যামুষ্যায়ণকা যে স্যুর্দত্তকক্রীতকাদয়ঃ।
গোত্রদ্বয়েঽপ্যনূঢ়াহঃ সৌদ্বৈশিশিরয়োর্যথা॥

It is not possible to ascertain which of these two versions of the text was before the author of the Nirnaya-sindhu. Even if it was the first version, and even if that version be the original and genuine version, the word দ্ব্যামুষ্যায়ণকাঃ could not be taken, having regard to the notorious variability of the word-order in a Sanskrit sentence, especially in verse, unquestionably as a predicate, instead of an attribute, in relation to the word দত্তকক্রীতকাদয়ঃ, so as to make the text read: 'All (sons) given, bought, &c. (are) *dvyam.* (For them), as for the Sunga-Saisiras, (there can be) no marriage in either *gotra*"; and thereby to erect in it a *vidhi* to the effect that all sons given, bought, &c. are, *ipso facto* and without more, *dvyam.* and therefore *dvi-gotra*, thus rendering the fundamental

text absolutely nugatory. For দ্বাম্যাদিবর্জা: might as well be taken attributively to ষড়কক্রীতকাদয়:, and the text rendered thus : "(For) all *dvyam.* (sons) given, bought, &c., as for the Sungasaisiras, (there can be) no marriage in either *gotra*". This construction does not, like the other, destroy the fundamental text, but merely removes from its purview such adopted sons as are *dvyam.* The distinction between a *suddha* (pure) or *kevala* (unqualified) and a *dvyam.* adopted son has, ever since the notion of *dvyam.*, originally connected with the *kshetraja* alone, was introduced into the law of adoption (Jolly, Tagore Lectures, 1883, p. 165 ; *Recht und Sitte*, section 21, p. 74 ; see the English translation by B. K. Ghosh) been deeply rooted in the later Hindu law (See D.-c., Suth. II. 35-40 ; IV. L 7 ; D.-m., Suth. VI. 41-48 ; Vyav.-m., Mandlik's Text, p. 43, and translation pp. 59-60 ; Balambhatti, *loc. cit.* Does Jolly, *loc. cit.*, have in mind the somewhat obscure Kaṭyayana-text cit. Vyav.-m., *ibid.* ? For a variant of the text, ascribed to *Paithinasi*, see D.-c., Suth. II, 39-40). This latter construction of the first version of the text in question is likewise in perfect accord with the second version of it, adopted by the three authorities aforesaid, which clearly recognises the distinction between the two kinds of adoption, and is based upon it. A *dvyam.* adoption arises, according to the D.-c. (Suth. II. 24, 34, 39-40) and the Vyav.-m. *(loc. cit.)* only by the agreement of the two fathers, and, according to the D.-m. (Suth. VI. 41), both so and also where all the *samskaras* ending with the tonsure (চূড়া) have already been performed on the boy in his natural family. The Nir.-s. could not therefore have relied either on that second construction of the first version or on that second version itself in support of its doctrine of an *ipso facto* dvyam. in the case of an adopted son. Even a *kshetraja* son is not *ipso facto* a *dvyam.* (See Manu, IX. 52-53 ; Mitakshara and Aparaṛka *ad* Yaj. II. 127, *cit. supra ;* G. Narayana & Haradatta, *cit. supra ;* Chandesvara, Vivada-ratnakara, G. C. Sarkar and D. Chatterjee's ed., text, pp. 40-41 ; Visvesvara, Madana-parijata, Bibliotheca Indica, p. 655 ; Kautilya, Artha-sastra, III. 7, Lahore ed., pp. 96-97 ; Sulapani, Sraddha-viveka, Chandismriti-bhusana's 2nd ed., pp. 296 ff) Lastly, the first construction of the first version of the text in question, on which the Nirnaya-s. seems really to have relied, is, for the reasons I have stated above, inadmissible. The Dharma-sindhu requires no separate examination. Here, as almost everywhere else, it merely copies the conclusions of the Nir.-s., and falls with it.

Next, the Balambhatti. In commenting *loc. cit.*, on the fundamental text, the author observes that the rule contained therein is inapplicable to marriage. No reasons are given here. Probably the matter is more fully dealt with in the Acara-Balambhatti, to which I have had no access.

Then, the Dattaka-darpana : a mere *ipse dixit* without proof, as in the Vyavahara-Balambhatti above, and therefore worthless.

Then, the Viramitrodaya and the Dattaka-didhiti. Both maintain that the rule of the fundamental text only applies to cases (for which see *supra*) other than that of marriage. Neither of them, however, states any reason for this conclusion. As I have already said, there is no warrant for restricting the orbit of the rule in this way. In prescribing that an adopted son must eschew both the *gotras* in marriage, the D.-di. refers to the Pravaramanjari "*et cetera*", the Viram. to the interpretation put by the Smriti-chandrika on the marriage-text as well as to the Pravaramanjari. As to this latter, see *supra*. The Smr.-c., I proceed to examine next.

Lastly, the Smriti-chandrika and the Dattaka-chandrika. They agree in holding that the fundamental text is all-embracing in its application, and knows no such limitations as were afterwards sought to be imposed on it by the Viram. and the D.-di. A *sagotra* of the natural father of an adopted son is thus, according to the Smr.-c. and the D.-c., no longer a *sagotra* of the latter, and would therefore, in the absence of a prohibition in that behalf, be eligible for marriage with him. Such a prohibition, however, they read in the marriage-text, which is this :

असपिण्डा च या मातुरसगोत्रा च या पितुः।
सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥

Buhler (The Sacred Books of the East, Vol. XXV, pp. 75-76) translates it : "A (damsel) who is neither a Sapinda on the mother's side, nor belongs to the same family on the father's side, is recommended to twice-born men for wedlock and conjugal union". This is a perfectly accurate rendering of the text, as it stands. But all the commentators of Manu, beginning with Medhatithi, as well as many other prominent jurists, to be named below, in all the various schools of the Hindu law, have taken the two *cha*-particles (*cha*—and, also) occurring in the text as being

meant respectively for the addition of the word *asagotra* in relation to the mother and of the word *asapinda* in relation to the father, so as to exclude a *sagotra* and a *sapinda* of the mother as well as of the father for purposes of marriage. In direct opposition to these high authorities, the Smr.-c., *loc. cit.* takes the particles in question as introducing the "person marrying" *(parinetri)* along side the "mother" and the "father" in the text, so as to make it say that a person marrying must not marry a *sapinda* of his own or of his mother, nor a *sagotra* of his own or of his father. But, inasmuch as the *gotra* of a person is identical with that of his legal father (and it is not denied that such a father in the case of a non-*dvyam.* adopted son is his adoptive father alone), the supposed prohibition in the text against marriage in one's own *gotra* by the side of the plain prohibition there against marriage in the *gotra* of one's father would be manifestly superfluous and unmeaning, and even this dual prohibition is of no avail against the rule of the fundamental text, which, as I have said, the Smr.-c. and the D.-c. recognize in its integrity, holding as they do that both by the very fact of the gift and by that text a son given in adoption ceases to belong to the *gotra* of his natural father. Caught thus in its own net, the Smr.-c. (for the D.-c. merely echoes its conclusion) tries to wriggle out of it by asseverating that the word "father" in the marriage-text is meant for the natural father of an adopted son; for otherwise, it argues, the use of that word would be nugatory. To have created a difficulty where none existed (cf. Buhler, the Manu-commentators, &c., *supra*) by introducing into the text, which is complete in itself, the word *parinetri* (the person marrying), which does not occur there and could not be attracted by the particle *cha*, and then to solve that difficulty by assigning that abrupt, unnatural and tendentious meaning to the word "father", *lest it should be nugatory*, is an exegetical process, which has only to be mentioned to be rejected. Such an interpretation makes a muddle of the marriage-text by mixing up cases of natural-born and adopted sons in a way which its exiguous frame will not bear (See D.-m., Suth. VI. 27 ff.). Furthermore, it launches the marriage-text in a direct conflict with the fundamental text. For what is the result of this interpretation? An adopted son may marry a *sagotra* of his natural father; for by the fundamental text she is no longer his own *sagotra*; but by the marriage-text an adopted son may not marry a *sagotra* of his natural father. That would be an irresoluble conflict, which it is the supreme canon of Indian exigetics, both religious and juridical, to avoid, wherever possible.

It cannot certainly be avoided by grafting the marriage-text (as the Smr.-c., and its followers do) as an exception on the fundamental text. For if there is one rule in the *mimansa*, which is repeatedly applied by our jurists more than any other, it is this that you cannot control an express text *(sruti)* by a mere implication *(linga)* spun out of the same or another text (Jaimini-sutra, III. 3. 14 : (শ্রুতিলিঙ্গবাক্যপ্রকরণস্থানসমাখ্যানাং সমবায়ে পারদৌর্বল্যমর্থবিপ্রকর্ষাৎ) ।

*(To be continued.)*

# Notes of Cases.

## Clifford *v.* Charles H. Challen & Son Ltd.

(COURT OF APPEAL : *Cohen, Asquith & Denning, L. JJ.*.
DATED DECEMBER 1, 4, 1950).

1950.
[1951] 1 All. E. R. 72.

*Master and servant—Servant contracted dermatitis from using synthetic glue—Protection cream in store but not in workshop—Master's duty to provide a safe system of work.*

The workman contracted dermatitis from using synthetic glue at his work. His case was that the employees had not taken sufficient precautions to prevent contraction of the disease. The learned Judge (*Sellers, J.*) held that it was not a case of negligence inasmuch as protection cream was kept in store though not in workshop. Against this decision the present appeal was preferred and it was *held* by the Court agreeing with *Denning, L. J.* that "when (an employer) asks his men to work with dangerous substances, he must provide proper appliances to safeguard them, he must set in force a proper system by which they use the appliances and take the necessary precautions, and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become careless about taking precautions. He must therefore by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them, if he has not shown a good example himself."

The appeal was accordingly allowed.

R. M.

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# MARRIAGE: IS MARRIAGE OF AN ADOPTED SON WITH A *SAGOTRA* OF HIS NATURAL FATHER PROHIBITED?—(*Concluded*).

BY

Late AVINAS CHANDRA GUHA, M.A., B.L.

As I have said more than once before, there is no express text in the Hindu law derogating in any way from the general rule of the fundamental text. Finally, this interpretation of the marriage-text is unknown to *all* the commentators of Manu; to the Mitaksara and Apararka *ad* Yaj. 1.53; to Chandesvara, *Grihastha-ratnakara,* Bibliotheca Indica, pp. 8-9; to Madhavacarya *ad* Parasara 11.15, Bibl. Ind., Vol. 11, pp. 468-469; to Visvesvara, Madana-parijata, Bibl. Ind., pp. 33, 134-136; and to Nandapandita, D.-m. (Suth. VII. 27 ff.). It is unknown, strangely enough, even to the Nir.-c., which follows here the Madana-parijata, and rests its doctrine, not on the marriage-text, but on other sources, reviewed at length above. What is more to the point, this interpretation by the Smr.-c. and the D.-c. of the marriage-text and its supposed corollary, with which I am more immediately concerned, are equally unknown to the authorities of the Bengal School. Bhavadeva, indeed, in his Dattaka-tilaka (Bharata Siromani, *op. cit.,* p. 321) cites neither the marriage-text nor the fundamental text, but he relies on a text of the Brahma-purana, also cited in the D.-c. (Suth. IV. 2), and explains the word [illegible] in that text exactly in the sense of the fundamental text, without hedging it in by any restriction or limitation. I may note here, in passing, that Bhavadeva is one of the old masters of our School, who is cited by Sulapani (Jolly, *op. cit.,* § 11, p. 33) and constantly so by Raghunandana, and that copious extracts from his Vyavahara-tilaka are collected in Halhed's "*Code of Gentoo Laws,*" while there is nothing in the case of *Monemotho* v. *Onanthnanth,* 2 Ind. Jur., New Series, 24: cit. Gour, *The Hindu Code,* 3rd ed., p. 72; or anywhere else, to justify any reasonable doubt or suspicion as to the

genuineness of his D.-t. (See its opening *sloka*: Bharata Siromani, *op. cit.*, p. 14). Even Sulapani, in the passage cited or summarized from his gloss on the marriage-text in Raghunandana, *Udvaha-tattva, Chandismritibhusana's* 5th ed., p. 7.

(क्षेत्रिमात्र गोत्रस्य द्विपितृकस्य क्षेत्रजादेर्बीजिसगोत्रावर्जनाय पितुरित्युक्तिः)

"The word 'father's' is used in order to exclude a *sagotra* of the owner of the seed, i.e., the natural father, in the case of a person having two fathers, but belonging to the *gotra* of the owner of the field, i.e., the husband of the natural mother alone, such as a *kshetraja*, etc.") does not sound a discordant note. Nothing could be more unfaithful to the original or more misleading than the garbled version of the passage in question in Shyama Charan Sarkar, Vyavastha-Darpana, p. 661, *Vyavastha* 402, Auth. 11. That passage is obviously inapplicable to an adopted son, for it postulates the existence of two different persons, one as the "owner of the seed" and the other as the "Owner of the field," whereas in the case of an adopted son they are one and the same person, namely, his natural father. Besides, *dvi-pitrika, bijin, kshetrin* are all terms of art, originally associated exclusively with the *kshetraja;* and, though the first two came to be occasionally used in connection with the *dattaka* too (the first for its *dvyam,* variety alone), *kshetrin* was never so used. Nor would the word *adi* in *Kshetrajadeh,* if it did not include an adopted son, be nugatory; for it may very well comprise the *gudhaja* (whom, indeed, Kautiya *loc. cit.,* designates as *sadharman, "homogeneous",* with the *kshetraja*), *the sahodha* and the *Kanina* son. Last of all, Raghunandana, the highest authority on the law of marriage in our School, takes, *loc. cit.,* the word "father's" in the marriage-text as indicating that the seven degrees of the *sapinda* relationship on the side of the father of the proposed bridegroom are to be counted, not from the bridegroom himself, but from his father. He also cites the fundamental text with this comment thereon (*op. cit.,* p. 18):

অত্র স্বধাশব্দঃ পিতৃভক্ষ্যার্থকঃ। তথা চ শঙ্খবিষ্ণুধৃতা স্মৃতিঃ। স্বধা বৈ পিতৃণামন্নমিতি। জনকগোত্র রিক্থা গ্রাহিত্বেন তৎ পিণ্ড স্বধা শব্দ প্রতিপাদ্যশ্রাদ্ধ কর্তৃত্বেন চ প্রতিগ্রহীতুরেব গোত্রাদি ভাগিত্বং দত্তকস্য প্রতীয়তে।

"Here the word *Svadha* means what is edible for the *manes*. So too the *smriti*, cited by Gunavisnu: "Verily, *svadha* is the food of the *manes*." Inasmuch as an adopted son does not take the *gotra* and the heritage of his natural father nor offers to him any *sraddha*, denoted by the words *pinda* and *svadha*, it is evident that he (the adopted son) shares the *gotra*, etc. of his adoptive father alone." Raghunandana leaves the fundamental text there, unfettered by any proviso or exception.

For all these reasons, I am of opinion that the rule propounded by the Smr.-c., the D.-c., and other works discussed above, prohibiting the marriage of an adopted son with a *sagotra* of his natural father, is unfounded and untenable; that it is at once an addition to and a deviation from the law of the Smriti, and is not based on it and that, as such, it is devoid of all authority:

*Sri Balusu* v. *Sri Balusu*,

L.R., 26 I.A. 113 (132)=I.L.R., 26 Mad. 398 (411-412).

*Puttu Lal* v. *Parbati Kunwar*,

L.R., 42 I.A. 155 (161)=I.L.R., 37 All. 359 (367).

*Karturi Gopalan* v. *Abburi Venkatarayudu*,

31 Ind. Case. 574 (577).

On the other hand, I am not aware of the prevalence in any district of Bengal of any custom or usage prohibiting such a marriage as aforesaid, which may be said to exist independently of that supposed prohibitory rule of the Hindu law, or in which that rule may be said to have been crystallized and embedded.

The question of law, which I have answered above, is one of first impression, and there is no judicial decision, determining it one way or another. I am, however, supported in my opinion by the majority of modern text-writers on the Hindu law, who do not accept the prohibitory rule of the D.-c. (Suth. IV. 8) so

far as it relates to a *sagotra* and either ignore it altogether, or cite it without following it, or again, having referred to it, question its validity. See Sutherland, *A Synopsis or General Summary of the Hindu Law of Adoption,* appended to his translation of the D.-m. and the D.-c., Head fourth, p. 219 (where the prohibition against a *sagotra* of the natural father is rightly confined to *dvyam.* adoptees).

Sir Thomas Strange, *Elements of Hindu Law,* Vol. 1, p. 87 (where by "relations" are certainly meant sagotras, for the author relies on D.-m. and D.-c. passages in which the Prayoga-parijata text is quoted. He also cites D.-c. IV.7, meaning probably IV.8, questions its correctness, and refers to Suth. Synop., p. 219, *cit. supra*).

W. H. MacNaghten, *Principles and Precedents of Hindu Law,* Vol. 1, p. 69 (where, as well as in the footnote, he has in mind only prohibited degrees, i.e., the *sapinda* as distinguished from the *sagotra-relationship.* His criticism of Strange *loc. cit.* falls wide of the mark, inasmuch as in appealing to Suth. *loc. cit.* he completely ignores Suth.'s significant restriction of the *gotra-rule* to *dvyam.* adoptions).

Sir G. D. Banerjee, *The Law of Marriage and Stridhan,* Tagore Lectures for 1878, 5th ed. (1923), p. 71 (where he speaks of prohibited degrees only, though citing D.-c. IV. 7-9. In the marginal notes on pp. 61 and 63 "Gotra" is distinguished from "Prohibited degrees," which, of course, means the *sapinda*-relationship).

Gopal C. Sarkar, *The Hindu Law of Adoption,* Tagore Lectures for 1888, 2nd ed. (1916), pp. 387-388; *A Treatise on Hindu Law,* 7th ed. (1936), pp. 250 ff. (The D.-c. IV. 8 is not even referred to, and its prohibition of a *sagotra* of the natural father not accepted).

Sir H. S. Gour, *The Hindu Code,* 3rd ed. (1929), pp. 461-462 (He too speaks of prohibited degrees only, citing Brihan-Manu cit. D.-m. VI.9, and makes no mention of the D.-c. of its doctrine at all).

Sir D. F. Mulla, *Principles of Hindu Law,* 8th ed. (1936), § 494 (3), p. 545 (Here also the phohibition is confined to the

"prohibited degree" in reliance on *Mootia* v. *Uppon*, (1858) Mad. S.D. 117, and without any reference to the D.-c. or any other authority).

Against this long array of modern authorities, spread over a period of more than a century, there are only four, who appear to hold a contrary view. They are:

(1) Sir F. MacNaghten, *Considerations on the Hindu Law as it is current in Bengal*, pp. 152-155: After stating generally that an adopted son cannot carry a girl in his natural family, if she is a *sapinda* "or if he might not have married her, had he never been adopted," the author explains at some length the sapinda-relationship is reliance on both the D.-c. and the D.-m., does not however cite the D.-c. IV. 8, rebukes Nandapandita for his unintelligibility, and winds up with a quotation of his D.-m. VI. 448 in Suth.'s not very accurate version, from which he (the author) seems to infer that an adopted son is *ipso facto* a son of two fathers, with two *gotras*. As I have already said, Suth. mistranslates यथासम्भवम् in that D.-m. passage by the phrase "for the most part" and the theory of an *ipso facto* dvyamusyayana is quite unknown to Nandapandita.

(2) Shyama Charan Sarkar, *Vyavastha-darpana*, Vyavastha 402, p. 661: He found on the D-c. IV. 35, meaning no doubt IV.8, and on the Sulapani-text cited above. I have dealt with both, *supra*. In the foot-note* at p. 887 he controverts Suth. Synop. p. 219 apparently on the basis of the D.c. IV. 8 again.

(3) West and Buhler, *A Digest of the Hindu Law*, 4th ed. (1919): At p. 838, the authors state the rule prohibiting the marriage of an adopted son with a relative in his natural family within seven degrees on the authority of the D.-c. IV. 7-9, the Vyav.-may. Ch. IV. Sec. V. para. 29. and Steel, 27, 47. At p. 1025, they begin by adverting to an adopted son's "incapacity to contract a marriage in the family of his birth," refer twice more to the rule of prohibited degrees for him in that family, and, without citing the D.-c. IV. 8, end by reproducing the statement of Steele, p. 186, that "he cannot intermarry with either his natural or adoptive *Gotra*." Now, Arthur Steele, *The Law and Custom of Hindu Castes within the Dekhun Provinces subject to the*

*Presidency of Bombay, chiefly affecting Civil Suits*, new ed. (1868), for W. and B. rely on this work, deals here with law and custom, separately from each other. At p. 47 (Adoption, XLIII) Steele, in stating the law as to an adopted son's capacity to marry in his natural or adoptive family, mentions the bar of prohibited degrees only in either family and not of *gotra* too, and refers to his own title Marriage, VI, pp. 26-27, where a bride's *gotra* is required to be different from the bridegroom's. At p. 186 (111. Existing Customs. Adoption, XLIII), however, the author makes the statement quoted above, on which W. and B. found, but which merely records a Custom prevailing in the Southern Mahratta country (See the meaning of the letter "D," appended to the statement, in the Preface, pp. XV-XVI). That statement is obviously no authority for the proposition formulated as a proposition of law, as distinguished from custom, in this Digest.

(4) J. D. Mayne, *A Treatise on Hindu Law and Usage*, 9th ed. (1922), § 172, p. 240: He states the rule of prohibition aphoristically after the manner of Sir F. MacNaghten, but, unlike him, refers to the D.-c. IV. 8. I have already discussed that *placitum* of the D.-c., so far as it bans a *sagotra*, threadbare, and shows it to be unfounded and untenable.

A word, in conclusion, about the relative authority of the Dattaka-chandrika and the Dattka-mimansa. It is well-known that notwithstanding the persistent tradition in Bengal, testified by all the more recent text-writers of note and now unreservedly accepted by Jolly (*Die Adoption in Indien*, Wurzburg, 1910, pp. 5-6), that the D.-c. is a literary fraud, it has repeatedly been recognized by the Judicial Committee as a work of high authority on all questions of adoption. But not only the D.-c., but the D.-m. also has been held to be so, even for Bengal:

*Pudma Coomari Debi* v. *Court of Wards*,

L.R., 8 I.A. 229 (246).

*Kali Komul Mozoomdar* v. *Uma Shunker Moitra*,

L.R., 10 I.A., 138 (149).

*Nagindas* v. *Bachoo*,
L.R., 43 I.A. 56 (67).

Assuming, now, that, in a case of conflict between these two s, the D.-c. is to prevail in Bengal—a proposition, however, which rests on a bare statement of W. H. MacNaghten, *op. cit.*, Preliminary Remarks, p. xxiii. cited *obiter* in the case of the *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (437) and in *Bhagwan Singh* v. *Bhagwan Singh* L.R., 26 I.A. 153 (161), and has not yet been judicially affirmed—the authority of the D.-c. in the present case is, as I have shown above, *nil*, and cannot therefore override that of the D.-m., which does not forbid a marriage between an adopted son and a *sagotra* of his natural father *qua* such *sagotra*.

The true scope of the maxim *factum valet* was defined by the Judicial Committee in *Sri Balusu's Case*, cited above, at p. 144 of the I.A. report. You cannot apply the maxim where a mandatory injunction of the law has been violated, for an act done in breach of such an injunction is void in law, and if such a breach could be healed by that maxim, there would be an end of all law. On the contrary, in the case of a merely directory or recommendatory injunction, an act done in contravention thereof is not void in law, and the maxim may well be applied to it, though even here a recourse to the maxim is by no means necessary, the act being valid without it. But, first of all, the maxim presupposes for its application the existence of an injunction or rule of law, and a breach of it. Had the prohibitory rule of the D.-c. (Suth. IV. 8) against the marriage of a *sagotra* of the natural father been a true rule of the Hindu law, there can hardly be any doubt that, its underlying purpose being indiscernible (adristarthaka), it would be a mandatory rule and the maxim thus unavailable in a case of violation thereof. But, as I have shown at great length above, that supposed rule of the Hindu law is unfounded and untenable, and does not exist. The question, therefore, whether the maxim *factum valet* is applicable to the present case, does not arise.

For general observation on the doctrine of *factum valet* on other lines, see V. N. Mandlik, *The Vyavahara-Mayukha*..... also the *Yajnavalkya Smriti*, Bombay, 1880, pp. 507-508; and on the marriage of *sagotras* generally, pp. 409-413.

## REVIEW.

**The Law relating to Legal Practitioners in India Pakisthan** by P. Ramanatha Iyer, author of Advocacy Series, Art of Cross examination, All India Civil and Criminal Court Manuals etc., assisted by R. Mathrubutham, Advocate, Madras, published by N. M. Tripathi Ltd., Book-sellers & Publishers, Princess Street, Bombay—2, Handy size. Price Rs. 12/-, 1951.

This book is mainly a comentary on the Legal Practitioners Act of 1879. We congratulate the Publisher for bringing out this useful book at a moment when it's need is urgently felt. The book is written in a very practical way-Case Laws and principles have been well discussed all through the book and a very useful appendix has been added incorporating all the relevant laws on the main point of the book. In our opinion, this will be a very useful book for the legal profession.